IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC17-782

vs.

DENNIS L. HORTON,

Respondent.

_____|

REPLY BRIEF OF RESPONDENT

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SYMBOLS AND REFERENCES

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

"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.

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

"Rule" or "Rules," unless otherwise further identified, refers to the Rules Regulating the Florida Bar.

Standard" or "Standards" refers to the Florida Standards for Imposing Lawyer Sanctions.

SUMMARY OF THE ARGUMENT

1) This case began as an ex parte proceeding in which the petitioner made material omissions of fact, causing harm to the respondent. The harm was in misleading this Court into emergency suspending the respondent.

2) Rule 3-5.2 does not provide any meaningful opportunity to a respondent to challenge the Bar's sole discretion to seek to petition the respondent. This is a violation of due process and fundamental fairness.

3) Respondent's case never warranted the disgrace and ignominy of a proceeding under Rule 3-5.2.

4) The referee's findings used to support the conclusion that Respondent had violated Rule 4-8.4(c) are not supported by the facts or law.

5) The referee's findings in mitigation should be upheld because they are supported by the record. The referee saw how this has devastated Mr. Horton. In determining the appropriate sanction this Court should consider the undue harm that Respondent has suffered thus far in this case.

ARGUMENT

I. RULE 3-5.2 GIVES THE BAR UNBRIDLED DISCRETION.

A. The Rule provides no remedy for its misuse.

The entire basis for the state bar to file a petition under rule 3-5.2(a) is that the responding attorney "appears to be causing great public harm." It requires that element to be predicated on clear and convincing evidence. Yet the rule affords the responding attorney no meaningful opportunity to be heard on that predicate issue, that is, whether the pleading is ethical, accurate, or legally sufficient. This makes for an unconstitutional due process violation. Part of the problem results from the vagueness in the term, "great public harm."

The rule provides no opportunity to challenge the base predicate for the suspension. The rule contemplates one procedural recourse, a Motion to Dissolve or Terminate the Suspension, however, that is only available once the suspension is ordered. *See* Rules 3-5.2(g) and 3-5.2(i). Stated differently, the rule provides for no procedure whatsoever to respond to the very premise on which the suspension is based, that is, presently causing great public harm.

In its Answer Brief the Bar relies on the word "appears," which precedes the operative phrase, "to be causing great public harm." Reliance on that argument merely highlights the core problem, which is: The Court has ceded to The Florida Bar the sole power to determine when a Florida lawyer is to be summarily and

immediately suspended from the practice of law. According to the Bar, Rule 3-5.2(a) applies when certain facts or allegations "appear" to the Bar to warrant the immediate loss of livelihood and other important personal interests that result from operation of the rule.

As noted, the only procedure the rule allows is to move to dissolve a suspension that is a *fait accompli*. A respondent has no opportunity to challenge the Bar's reliance on "appearances" in electing to file a petition under rule 3-5.2(a) in the first instance. This taking of an extraordinary privilege without recourse, without a meaningful opportunity to be heard, violates the state and federal constitutions.

Further, the standard by which the Bar can rebut a motion to dissolve or terminate the suspension is so low as to not constitute any meaningful opportunity at all. Rule 3-5.2(i) permits dissolution of the suspension only if the Bar cannot show a likelihood of proving *any element* of *any alleged rule violation*. ("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.") Thus, a respondent is not only precluded from asserting that he is not presently causing great public harm—that is, that he is entitled to the full rights of a typical respondent—he also must show that there exists no proof of any element of any pleaded rule violation.

In this way the rule appears to afford a remedy, but one that is illusory. No Bar case ever gets to a pleading stage without basic proof of a single element of a rule violation—what is typically termed "probable cause." Since probable cause is present whenever the Bar initiates a disciplinary proceeding, the reference to this low threshold within Rule 3-5.2(g) is of substantial use only to the Bar, to rebut the motion for dissolution. It offers no meaningful due process opportunity to a respondent, at all.

Indeed, the whole point of filing a petition under Rule 3-5.2 is a clear and present "emergency," for which the Bar cannot waste time submitting the file to a local grievance committee for review and a probable cause finding. And yet, the Bar's sole discretion in determining that such an emergency exists can never be challenged in a meaningful way.

B. Under this Court's Standard, the petition was improvidently filed.

Standard 2.4 of the Florida Standards for Imposing Lawyer Sanctions sets forth the Court's understanding that a petition for emergency suspension does indeed create an ex parte proceeding at law:

> "Although due process does not require a hearing prior to imposing an emergency suspension following a criminal conviction, an opportunity to show cause as to why it should not be imposed should be available. An emergency suspension remains in effect until it is lifted by the court, or until the court imposes a final disciplinary sanction after compliance with relevant procedural rules."

Fla. Stds. Imposing Lawyer Sancs. 2.4, Cmt.

As explained, the opportunity to show cause is illusory. Standard 2.4 admits there is no due process "following a criminal conviction," but it also admits that "an opportunity to show cause as to why it should not be imposed should be available." While the Court proposed that due process should be available—even upon a criminal conviction—the due process and remedy that appears in the text of Rule 3-5.2 renders the potential opportunity meaningless, and therefore unconstitutional.

The Florida Bar asserts that this facts of this case, which it gathered over six months, fall squarely within the stated purpose for having this rule:

> "Emergency suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Emergency suspension includes:
>
> 1) suspension upon conviction of a "serious crime;" or
> 2) suspension when the lawyer's continuing conduct is or is likely to cause immediate and serious injury to a client or the public."

Fla. Stds. Imposing Lawyer Sancs. 2.4 (empahsis added).

As is explained herein, Respondent's case, as investigated thoroughly by The Florida Bar, did not fit either of the categories set forth in Standard 2.4. As Respondent has stated throughout, his was never an emergency suspension case.

Regardless of whether a license to practice the law is viewed as a property interest, it is, undoubtedly, an extraordinary privilege that deserves the protection

of procedural due process.[1] Here there is a disconnect regarding the type of case that a petition filed under the rule initiates. In its Answer Brief the Bar argues that the Petition filed against Respondent did not initiate an ex parte proceeding. In reality, the entire scheme of Rule 3-5.2 is to effect a suspension of a law license on an ex parte basis. By Standard 2.4 the Court acknowledges this reality.

A corollary is found in the context of domestic relations law. However, in that arena a respondent may move to dissolve, and may actually succeed in dissolving, an ex parte injunction on such predicate matters as lack of harm. *See Bieda v. Bieda* , 42 So.3d 859, 862 (Fla. 3d DCA 2010) (reversing ex parte injunction where injunction did not "define the injury, state why such injury is irreparable or provide reasons why the order was granted without notice"); *cf. Lerner v. Dum*, 220 So.3d 1202 (Fla. 4th DCA 2017) (when the party who was enjoined ex parte does not file a motion to dissolve, the court will only review the legal sufficiency of the pleading and order).

Here, Respondent did challenge the sufficiency of the Bar's Petition and the resulting order of suspension, but the rule denied him any meaningful opportunity

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[1] Some courts have recognized a property interest in a law license. *See e.g., Huckaby v. Alabama State Bar*, 631 So.2d 855, 857 (Ala.1993), *on reh'g* (Jan. 21, 1994) (citing *Worley v. Alabama State Bar*, 572 So.2d 1239 (Ala.1990)); *Greening v. Moran*, 739 F.Supp. 1244, 1251-52 (C.D.Ill.1990) ("The property interest [ ] is Greening's property interest in his license to practice law.").

to do so. Every other type of Bar case provides a respondent with a meaningful opportunity to respond before his fundamental privilege can be affected. Because an emergency suspension proceeding under rule 3-5.2(a) does not provide for any such opportunity, the rule fails to provide necessary procedural due process.

Consider the futility of seeking to respond to the instant Petition, in which the Bar's auditor attested that, *inter alia*, Mr. Horton's trust accounting records were not in strict accordance with the rules governing them. At trial, this auditor testified that every trust accounting audit he has ever performed revealed some rule violation. From this distance we know that Mr. Horton had two employees who diligently kept detailed trust accounting records. *See* R. Exh. 20, Affidavit of Annette Kirk. Yet even with that Respondent could never show that The Florida Bar could not prove *any element* of *any* record-keeping rule violation, because, as the auditor testified, virtually no bar member could ever show that. This example illustrates the uselessness of the opportunity to be heard on dissolving an emergency suspension under Rule 3-5.2(i). The effort is, in a word, futile.

The Court could not have intended such an unfair imbalance in approving Rule 3-5.2. Yet, this case clearly illustrates how the rule fails in basic due process protections, and how the gaps in the rule can be exploited by avid prosecutors. A petition filed under rule 3-5.2(a), for all rights and purposes, initiates an ex parte proceeding in which no meaningful response is allowed to challenge the predicate

allegations as to whether it is an "emergency," or whether the respondent indeed "appears to be causing great public harm."

The Court should expressly fashion a procedure to present such questions and craft an appropriate remedy, if it is shown that the order of suspension was improvidently granted. The remedy would be to vacate the order of suspension and convert emergency suspension proceeding into a regular attorney disciplinary proceeding, where full due process rights are accorded.

The potential for misapplying the rule is palpable in this case. In the instant Petition, the Bar failed to inform this Court of pertinent, known adverse facts. This is sanctionable misconduct when this Court finds it done by others. *See* Rule 4-3.3(c) ("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."); *see also Fla. Bar v. Mason*, 334 So.2d 1 (Fla. 1976) (attorney suspended one year for ex parte communications with this Court); *Fla. Bar v. Tobin*, 674 So.2d 127 (Fla. 1996) (attorney suspended for failing to advise court of known adverse facts in ex parte setting). *See also* Standard 6.11(b).

This case underscores the immense power that is ceded to The Florida Bar under Rule 3-5.2(a), and how such power can be abused or misapplied. The Bar has been given the power to terminate a person's means of making a living. This

power lies in the Bar's sole and unfettered discretion to file, or not file, a petition under Rule 3-5.2. When immunity is afforded to the disciplinary authority regarding a pleading prerogative, which cannot be challenged, the prerogative is subject to misuse. This power resides in the Bar because the rule fails to provide any check on the Bar's pleading prerogative. There are real world consequences if this power is misapplied, but none of the consequences inure to The Florida Bar, only to respondents.

Procedural due process rights have their roots in the Fifth and Fourteenth Amendments to the U.S. Constitution, which prohibit the federal and state governments, respectively, from depriving any person of life, liberty, or property, without due process of law. A hallmark of liberty is the freedom of enterprise, the right to pursue a profession to provide for oneself and family. This right is expressly protected as a basic right of citizenship in the Civil Rights Act of 1866. It is also among the "privileges or immunities" protected by the Fourteenth Amendment. *See* Sandefur, Timothy, The Right to Earn a Living: Economic Freedom and the Law; Cato Institute (2010).

"At the common law," wrote Blackstone, "every man might use what trade he pleased." Commentaries ([1765] 1979, 1:415). The Privileges and Immunities Clause "protects the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling.'" *McBurney v. Young*, 569 U.S. 221, 225 (2013)

(emphasis added) (citing *Hicklin v. Orbeck*, 437 U. S. 518, 524 (1978) and *Supreme Court of N. H. v. Piper*, 470 U. S. 274, 279-83 (1985) (stating that the practice of law is a privilege covered by U.S. Const. Article IV, § 2). The pursuit of one's profession, or "common calling" is a foundational right protected under the Privileges and Immunities Clause. *See Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *see also United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984) (the pursuit of a common calling is one of the "most fundamental privileges" protected by the clause.). The *Camden* court identified it as a "basic and essential activity." *Camden*, 465 U.S. at 219.

The essence of procedural due process is notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). A basic tenet of due process is that, before the state can impair a property interest or deprive liberty, the affected person must not only be notified, but afforded an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Procedural due process is simply "a guarantee of a fair procedure." *Zinermon v. Burch*, 494 U.S. 113 (1990).

The provisions of Rule 3-5.2(a) operate to ignore and marginalize a lawyer's procedural rights of due process. The history of this case shows that the State action wrongfully impeded an innocent attorney's (Michael Horton's) ability to practice his profession simply because he was a signer on bank accounts that

became frozen upon the order of suspension. Procedural due process should protect Mr. Horton and his son from the coercive power of state government by ensuring that the adjudication process is fair and impartial, and by providing for sufficient and timely notice and an opportunity to be heard. Notwithstanding any other fact, if Respondent had been accorded an opportunity to be heard on the premise of the Petition, before any State action occurred, the collateral harm that was done would have been prevented, not just repaired later.

C. The Bar's initiation of this case lacked candor.

The Florida Bar feels it must obtain disbarment in order to justify its resort to Rule 3-5.2 in the first place. Clearly, the Bar believes that a case warranting (only!) a two-year suspension does not fit the model of a case it should be filing under Rule 3-5.2. And that is correct: anything short of disbarment will reflect poorly on the Bar's decision to use Rule 3-5.2, and its aggressive use of the rule.

This Court should not provide cover for the Bar's poor judgment. "Most courts, however, reserve disbarment for cases in which the lawyer uses the client's funds for the lawyer's own benefit." Standard 4.11, Cmt. There is no explicit finding that Respondent did so and no finding that his fees were clearly excessive.

By its very nature the emergency suspension rule must necessarily anticipate the most severe sanction—or else why resort to it? The Bar's Petition filed under Rule 3-5.2 highlighted Edward Lowman's loans to Respondent totaling $90,000

—but failed to note that all loans were repaid with interest months before the Bar filed the Petition ... and even before it deposed Mr. Lowman in yet another ex parte setting. *See* Motion to Strike Testimony of Edward Lowman, Dkt. 56. Moreover, each allegation of the Petition recited conduct set firmly in the past, ending months before the Petition was even drafted.

The Petition pleaded for Respondent's immediate suspension "based on facts that establish clearly and convincingly that Dennis L. Horton appears to be causing great public harm by taking improper loans from his clients and commingling trust funds in his operating account that had excessive overdrafts resulting in trust funds being misused for purposes other than those for which they were intended." Petition, at 1. A close reading of the Petition's allegations, however, reveals nothing more than a garden variety Bar disciplinary proceeding that does not implicate or establish the presence or causation of "great public harm."

In its Answer Brief the Bar argues the importance of focusing on the "appearance" of causing great public harm. If the Bar is focused on appearances, it should consider the appearance created by the Bar's lack of candor to this Court in failing to plead known adverse facts, especially the fact Respondent paid back the loans with interest, and the fact that he was not presently causing great public harm. Now we have the Bar appealing the findings and recommendations of the

referee in order to substantiate, *ex post facto*, its misuse of Rule 3-5.2 through its selective and questionable representations.

The questionable nature of the Bar's efforts began in the staff investigation phase, which lasted some six months—more than enough time to have a grievance committee review the matter. In its investigation the Bar determined to depose Mr. Lowman, and to exclude from that deposition the Respondent and his legal counsel. Rule 3-7.11(d)(3) is silent on whether the adverse party and counsel have a right to attend a deposition taken by the Bar; however, traditional tenets of protocol, ethics and professionalism all fairly require notice, at the very least. Respondent and his counsel were excluded from the deposition expressly to disadvantage Respondent at trial; the Bar knew it could use Mr. Lowman's ex parte deposition transcript at trial, and that no one acting for the Respondent would ever question the sole complaining witness.

The admission of that deposition transcript at trial was error, an abuse of discretion under the circumstances. The Respondent moved that it be stricken based on the breach of basic fairness and procedural due process, and moved that the Bar be sanctioned over the matter; however, the referee denied the motion. *See* Dkt. #56. The motion should have been granted. Had Respondent been invited to the deposition, Mr. Lowman could have answered the pertinent question as to whether he took Respondent's advice and had a Georgia lawyer review the trust

amendment that named Respondent as a beneficiary. Also, because their personal friendship grew, and continued long past the legal services for which he had hired Respondent, Mr. Lowman could have elaborated on whether he deemed himself to be Respondent's law client, or merely a longtime friend, when he offered to loan the money. See TR-1, p. 57, lines 16-22 ("Mr. Lowman was a – originally he was a client. We became very good friends and over the years[.]") These are just some of the areas of factual inquiry that Mr. Lowman's unavailability for trial and the use of his one-sided deposition will never answer.

The Bar apparently believes that, if it can convince this Court to disbar this respondent, its questionable methods will be wiped clean, the defects in Rule 3-5.2 will remain in full force and effect, its pleading prerogative will go on unhindered, and its decision to file under that rule in this case will somehow be rehabilitated, justified, or sanctified. The Bar either misread this case, or is using base motives.

The Bar's prerogative to proceed under Rule 3-5.2 is offered to justify its discrimination against those respondents who, but for the rule's defects, would have a meaningful opportunity to challenge the Bar's predicate allegations for invoking the rule. The Bar's prerogative involves the revoking of a fundamental privilege by the State without due process of law. When such an ex parte proceeding is initiated through a misleading Petition, it raises the question of the rule's constitutionality, as applied to this Respondent.

In a case involving removal of a judge under the Judicial Qualifications Commission, it was stated that "this Court may exclude from the judiciary those persons whose unfitness or unsuitability bears a rational relationship to his qualifications for a judgeship, so long as the adjudication of unfitness rests on constitutionally permissible standards and emerges from a proceeding which conforms to the minimum standards of due process." *In re Kelly*, 238 So.2d 565, 569 (Fla. 1970) (underlining added).

In an early Fourteenth Amendment case, the supreme court stated:

> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law[.] And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights[.] The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, [ ] as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

Hurtado v. California, 110 U.S. 516, 528 (1884).

Rule 3-5.2 cedes arbitrary power to The Florida Bar to terminate at will a person's livelihood. The most egregious aspect of the Bar's decision to file a Petition under Rule 3-5.2 in May 2017 is that the Bar omitted the fact that Mr. Horton sold a commercial property in January 2017, which resolved his ongoing financial difficulty. *See* R. Exh. 11, Warranty Deed and HUD closing statement sale of property to Nemiro Properties, LLC by Dennis L. Horton and Suzette L.

Horton. This sale, which had been pending for some time, enabled the respondent to repay Mr. Lowman and to finally get his law firm operating account out of the red. The Florida Bar knew these facts in early 2017, and yet still filed a Petition for Emergency Suspension several months later, alleging improper loans (no repayment noted) and the out-of-balance operating account (since rectified). These material omissions served to mislead this Court.

The order of emergency suspension wreaked havoc on Mr. Horton's law firm, in which his son, Michael G. Horton, was then a partner (and is now the sole stakeholder), specifically with regard to the firm's bank accounts. This is another reality that makes it imperative that The Florida Bar draft these Petitions in clear, complete, and precise terms, to avoid such collateral damage to non-parties. And attorney for one of the firm's banks, Scott D. Leitner, Esq., asked bar counsel to clarify whether Michael Horton could use the bank accounts. *See* R. Exh. 3 (also attached as Exhibit 1 to Dkt. #7, Motion to Dissolve or Modify Order of Emergency Suspension). The Bar's answer was that he could not.

The order of suspension did not order any bank accounts to be frozen. The order of suspension did not mention Michael G. Horton. The Bar took it upon itself to communicate to the banks and to Michael Horton. Mr. Leitner's affidavit attests that bar counsel gave him legal advice as to the meaning, nature and scope of this Court's Order. Interpreting court orders for others is not the function of the

Florida Bar, and not a role the Bar should be assuming under any circumstance, in these premises or otherwise. This situation only serves to illustrate how the omissions and commissions of The Florida Bar may have created and aggravated these circumstances.

Mr. Horton does not dispute that some respondents should be emergency suspended. But where, as here, the respondent is present, available and cooperating, there is no disability in permitting an opportunity to be heard on whether an emergency suspension is appropriate. In the final analysis, Rule 3-5.2(a) negates any opportunity to be heard as to the basis for the Petition itself. Whatever opportunity the rule later provides for, after the Petition is granted, is academic and, in practical terms, meaningless. Perhaps worst of all, this case shows how The Florida Bar dutifully publishes the results of the unfair advantage the rule provides to the Bar. *See* Notice of Filing Florida Bar Press Release, Dkt. #29. This is a needless extra harm.

For these foregoing reasons, this Court should investigate how to infuse this rule with procedural due process safeguards, because this scenario is capable of being repeated against other members of The Florida Bar.

II. THE RECOMMENDED SANCTION SHOULD BE AFFIRMED.

A. The Findings as to Rule 4-8.4(c) are insufficient for disbarment.

Significantly, the referee did not find any direct misappropriation of client

funds, and did not find that Respondent's fees were clearly excessive. The referee did find that the law firm had, on isolated occasions, received cost deposits into its operating account which did not get transferred to the trust account until sometime later. Those small credit card deposits were put into the operating account at a time when that account carried a negative balance, which explains the referee's finding that those funds were used for a purpose other than for that which they were intended. In the grand scheme, this is a minor accounting matter.

Respondent does not dispute that the finding is technically correct. But it is also correct that his bankers never failed to pay a single draft from his firm's operating account, and it also correct that the subject deposits were later transferred to the trust account and accounted for properly. Respondent asserts that this is just the sort of accounting miscue that can occur in any high volume practice, and that such errors merely highlight the Bar's auditor's testimony that no law firm is completely immune from committing such errors.

The referee correctly did not attribute these accounting errors to a violation of Rule 4-8.4(c). Because the cost deposits had been, at one time, used for an improper purpose, the referee attributed this as a violation of Rule 5-1.1(b).

Regarding fraud, the Report, at pp. 16-17, states as follows:

> "Respondent acknowledged and testified that he took funds for fees from Ms. Barry's estate account as a personal representative prior to him being formally appointed by the probate judge. On August 30, 2016, under a

> power of attorney, respondent transferred $30,000 of $32,000 from Ms. Barry's money market account to her checking account. On the same day, respondent then transferred the $30,000 to a trust account for Ms. Barry. On September 5, 2016, Ms. Barry passed away. The next day, respondent issued a check in the amount of $17,500 from the trust account to his operating account. The memo on the check indicated that half of the funds were for attorney's fees and half for his appointment or work as the personal representative. At the time of the issuance of the check, respondent had not yet been appointed as personal representative. He was formally appointed personal representative two (2) days later by the court."

In order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, The Florida Bar must show the necessary element of intent. *Fla. Bar v. Lanford*, 691 So.2d 480, 481 (Fla. 1997). A representation that is merely negligent or poorly informed will not suffice. In order to satisfy the element of intent to defraud the Bar must prove that the conduct was deliberate or knowing. *Fla. Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla. 1999). The verb "knowing" in this regard "denotes actual knowledge of the fact in question." *See* Preamble, Chapter 4, R. Regulating Fla. Bar (Definitions). The Preamble also defines "Fraud" or "fraudulent" as conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." The referee made no such explicit findings with respect to Respondent writing himself a check for his PR fees on the same day he expected the probate court to issue him letters as PR.

It is undisputed that Respondent was experiencing financial problems in

2016. He cooperated and testified forthrightly about all those matters. Here, the referee found that Respondent writing fees to himself as a personal representative two days before the court named him as personal representative was an act involving dishonesty, fraud or deceit. In other words, if he had waited the two days to write the check, he would not have violated Rule 4-8.4(c). The evidence was unclear of when the check was actually negotiated and the money received. If either took two days, then this factual finding is diluted or negated. In any event, the finding rests solely on this two-day timing fact. *See* Bar Exh. 13 and 14.

Respondent testified that he knew a will contest was coming from Ms. Barry's disinherited children, and he was correct in that regard; he stated that the testator's home had been accessed, the locks changed and items removed. TR-2, p. 240, line 17 to p. 242, line 18. He acted precipitously by two days in taking his fees to secure the home and estate.

Respondent testified that due to the exigency he wrote the fee check and expected the court to issue letters that day, but that he had to travel to the court two days later to actually get that accomplished. *See id.* These circumstances are not sufficiently clear and convincing to reasonably infer that Respondent's conduct was deceitful or dishonest; *Cf.* Preamble, Chapter 4, R. Regulating Fla. Bar (Definitions) (defining fraud). It is not clear and convincing.

As a factual matter, Respondent's expectation of a prompt issuance of

letters was incorrect, but as a matter of law, it is not the sort of dishonest conduct that Rule 4-8.4(c) historically addresses. Taking a PR fee two days before actually being named the PR is more in the nature of a prohibited fee under Rule 4-1.5, as opposed to a fraud. For a litigated case—let alone an emergency suspension—to proceed on such a minor timing discrepancy appears misbegotten at best, and overblown at worst.

The Report goes on to recite the amounts and dates that Respondent transferred Ms. Barry's personal funds to his control. No finding was made as to whether Ms. Barry had previously directed Mr. Horton to do this, or whether they had an understanding that he was to make sure her children could not access her money, but it is clear beyond doubt that she had disinherited both her children.

The Report also asserts Mr. Horton's taking of fees from his client, Richard O'Connell, was fraudulent, to wit:

> "Although no evidence indicated that the yearly net fees for 2014, 2015, and 2016 were not earned, there was no satisfactory rationale as to why in 2016 respondent collected over $40,000 above what he indicated he had earned. It is recognized that throughout the year, this overage was returned to Mr. O'Connell. Additionally, Mr. O'Connell's JP Morgan account had numerous withdrawals through the course of 2016, upwards of $66,000, which respondent indicated went for payment of Mr. O'Connell's expenses; however, on three occasions Mr. Herdecker discovered the use of funds from the JP Morgan account for respondent's financial matters."

Report at 18.

This finding ignores the competent substantial evidence submitted by Mr.

O'Connell himself. *See* R. Exh. 8, Affidavit of Richard O'Connell. The following rationale is quoted directly from his affidavit:

> "I am aware that Mr. Horton pays his fees from my checking account. I have received an accounting of his fees and I do not consider them to be unreasonable for all the work Mr. Horton does for me.
>
> "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.
>
> "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.
>
> "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.
>
> "Mr. Horton takes care of many things that I have authorized him to do for me. 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."

R. Exh. 8, para. 4-8.

The referee heard Respondent testify essentially similar to the statements made by Mr. O'Connell in the affidavit. Lest anyone discount the affidavit as not the work product of Mr. O'Connell, his affidavit attaches three separate letters

which he typed and signed and sent to Respondent prior to the undersigned's hiring, to wit: "I wrote and sent the three notes attached to this Affidavit to Mr. Horton regarding his services as my lawyer." R. Exh. 8, para. 9.

In his letter to Mr. Horton dated November 29, 2016, the Court can see that Mr. O'Connell is generous with his money to the staff of the ALF, and to his caregiver, Maria Luna. These impulse expenditures are consistent with his affidavit and with Respondent's testimony. By his affidavit and this letter Mr. O'Connell not only provides a rationale for, but also ratifies, the taking and replacing of fees by Mr. Horton, and it supports the reasons for doing so, as Mr. Horton testified.

The Florida Bar served a "proposed Report of Referee" to the Hon. Phillip Pena by email on October 20, 2017, three days before the sanctions hearing. (The Bar's proposed report is not included in the Record Index.) In filing for the emergency suspension, The Florida Bar could not fathom a reason for Respondent taking and then replacing fees from Mr. O'Connell's account. The referee adopted the Bar's position into his Report (referencing "no rationale"). But supposition and surmise are not components of clear and convincing evidence—nor is the lack of a discernible "rationale." This recitation shows that the Bar did not produce clear and convincing evidence that Respondent knowingly violated Rule 4-8.4(c) by or through *replacing* fees into his client's account to pay for what the client

wanted, and to avoid overdrafts. Competent substantial evidence was not adduced proving the necessary elements of that rule violation, while competent substantial evidence was in fact adduced adequately explaining the rationale for the taking and replacing fees.

Clear and convincing evidence is an "'intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.'" *In re Davey*, 645 So.2d 398, 404 (Fla.1994). Competent substantial evidence was adduced showing the lack of requisite intent by the Respondent in paying Mr. O'Connell's fees and expenses. The Florida Bar failed to overcome that evidence and failed to prove the requisite intent by its heightened standard of proof. The allegations and proof of a violation of Rule 4-8.4(c) were thoroughly deficient to sustain a verdict of guilty under that rule.

III. THE TWO-YEAR SUSPENSION OR LESS IS APPROPRIATE.

A. <u>The referee's findings in mitigation cannot be disturbed.</u>

The evidence was clear and convincing that Respondent's one-time client and longtime friend, Edward Lowman, willingly loaned him money and that Respondent paid it back. By ignorance born of neglect Respondent failed to know or follow the dictates of Rule 4-1.8 in accepting the loan, and years ago, in making

a trust instrument for Mr. Lowman in which he was named a beneficiary. Also, Respondent paid himself a fee two days before having the legal authority to do so. Upon this quantum of proof, all of which Respondent admitted, the Bar seeks disbarment. The plea for disbarment is the Bar's effort to cleanse its original sin in initiating this wrongful emergency suspension case.

While the factual findings and their legal significance can be reasonably debated in this case, the referee's findings as to aggravating and mitigating factors cannot. Like other factual findings, a referee's findings of mitigation and aggravation 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). This Court will generally not second-guess a referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *Fla. Bar v. Brown*, 905 So.2d 76, 83-84 (Fla. 2005); *Fla. Bar v. Temmer*, 753 So.2d 555, 558 (Fla. 1999).

Respondent admits that Standard 7.2 applies to these findings and evidence. "Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." The question for the Court is the length of suspension, under all the circumstances presented here.

Respondent practiced for 43 years in Clermont, Florida and has no prior

disciplinary history with The Florida Bar. The Bar received a complaint from Edward Lowman, which was actually handwritten by a Florida Bar investigator from the Orlando branch, David Pennell. The investigator mailed the complaint containing Mr. Lowman's signature not to Tallahassee but to the Orlando branch's chief disciplinary counsel, using his own Florida Bar office envelope. *See* Dkt. #56, Motion to Strike Testimony of Edward Lowman, and Dkt. #59, Response to Motion to Strike Testimony of Edward Lowman. These events are another prime reason why Respondent and his counsel should have been included in Mr. Lowman's deposition.)

The Bar took the deposition of Mr. Lowman in between Respondent's two depositions. Respondent provided copious trust accounting and banking records. During the investigation he sold the property that resolved the financial difficulty that he freely admitted having.

The Bar's auditor admitted Respondent was cooperative and forthcoming in responding and producing documents. TR-1, p. 170, lines 12-24. The Bar subpoenaed nine of his client files and combed through all of them. It found that in one instance Respondent took a fee two days before he was supposed to (Christa Barry), and in another (Richard O'Connell) he had taken out his fees in a one-step-forward / one-step-back manner. The implication was that he was stage-managing that; however, no finding was ever made that his net fees were clearly excessive.

The fees were taken in this unorthodox way because, as Respondent and Mr. O'Connell himself explained, Mr. O'Connell's income (separate from his assets) was at times not sufficient to meet his expenses or what he wanted to be paid. That fairly sums up the investigation of this case, and it is what the Bar relied upon in petitioning this Court for an emergency suspension.

The Bar was very put out by Respondent's repeated and chronic overdrafts in his operating account. The Bar took this as motive for a nefarious scheme. Yet, again, Respondent's overdrafts ceased in January 2017 once the sale of his commercial building finally closed. So, despite the Bar knowing this, it still determined to suspend Respondent in its very public, "emergency" fashion.

The Florida Bar followed one single-minded arc in investigating and initiating this case. It is no breach to say that the Bar never offered anything other than voluntary disbarment. This has been the drumbeat all along. The intent and the result of the Bar's investigation and initiation of this case was to needlessly inflict disadvantage and insult onto Respondent, who is a good man. The Court should consider the totality of this case very seriously in determining what kind of mandatory state bar the lawyers in florida should rightly have.

B. <u>The mitigating evidence is impressive and compelling</u>.

Respondent does not dispute the referee's findings regarding aggravating and mitigating factors and evidence. Respondent's character and reputation

evidence was very strong and compelling. Character is what you really are, while reputation is what others think you are. Respondent presented evidence of both. His civic record is long and admirable, the causes he has championed are worthy. It is all too extensive to even list here. *See generally* TR-3, sanctions hearing.

Euripides wrote, "Friends show their love in times of trouble, not in happiness." He was, of course, speaking of true friendship. At the hearing on sanctions, seven of Mr. Horton's friends appeared and gave testimony, as did he and his wife, Suzanne Horton. That Mr. Horton has such eminent and stalwart friends speaks volumes. Several others, including the Clerk of Court of Lake County, submitted letters in his behalf.

When all is said and done, Mr. Horton respectfully asks the Court to consider the effect that this Court's order of emergency suspension had on him and on his family, and to weigh that, and the known facts, properly against the irregularities in how this case proceeded. The local paper headlined his suspension, and his wife had to deal with television reporters on her doorstep. TR-3, pp. 60-64. His son's business and reputation suffered through mere association. Respondent had to ask seven of his closest friends to come to court and vouch for his character and reputation. After 43 years of an unblemished legal career, how much should these things matter with respect to an appropriate sanction?

The proper course for the Court at this juncture is to consider the way this

case was initiated, understand how the defects in Rule 3-5.2 can be exploitative, appreciate the harm already inflicted, and then to do justice by limiting this respondent's suspension to time served, or to the two years recommended by the referee, so that Respondent will be permitted to petition for reinstatement as a member of The Florida Bar.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests entry of an order by this Honorable Court concluding his suspension and allowing him to petition for reinstatement as a member of The Florida Bar.

CERTIFICATE OF SERVICE

I CERTIFY that this reply brief was e-filed through the portal with the Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925 and served to Carrie C. Lee, Esq., at clee@floridabar.org, and Adria E. Quintela, Esq., at aquintel@floridabar.org, The Florida Bar, 561 E. Jefferson Street, Tallahassee, Florida 32399 on August 9, 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