IN THE SUPREME COURT OF FLORIDA
Before a Referee

THE FLORIDA BAR,

Complainant, Case No: SC17-782

v.

DENNIS L. HORTON,

Respondent.
_____/

MOTION TO DISSOLVE OR MODIFY ORDER OF EMERGENCY SUSPENSION

Respondent, DENNIS L. HORTON, through undersigned counsel, respectfully requests entry of an Order from this Court dissolving or modifying the Order of Emergency Suspension entered *ex parte* on May 3, 2017, and he states:

1. This motion is filed under Rules 3-5.2(g) and 3-5.2 (i) R. Regulating Fla. Bar.

2. Respondent, DENNIS L. HORTON, previously filed an Emergency Motion for Clarification of the subject Order. That motion he incorporates as if set forth herein, to be heard with this motion.

3. The previously filed Motion for Clarification seeks to determine the extent to which the subject Order affects the business operating accounts that Mr. Horton's firm, the Law Office of Horton & Horton, P.A., maintains. His Motion for Clarification seeks to determine the extent to which another member of the

firm, Michael G. Horton, Esq., is prohibited or enjoined from accessing or using the firm's real estate trust account or any firm operating account.

4. The previously filed Motion for Clarification points out that the subject Order does not expressly freeze any bank account, nor does it name, or affect, or prohibit any person other than Dennis L. Horton.

5. However, The Florida Bar has advised at least one Bank attorney who contacted Bar counsel seeking clarity regarding the subject Order that the law firm's bank accounts are all frozen and that Michael G. Horton, as well as Mr. Horton, is enjoined from accessing or using any account at that bank. *See* Exhibit 1, Affidavit of Scott D. Leitner.

6. The Order applies only to Mr. Horton – not Michael G. Horton – and The Florida Bar's advice to these banks as to the purpose and meaning of the subject Order, is against the plain language of the subject Order.

7. The Florida Bar had no legitimate factual basis to assert to this Court in its *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 does not set forth clear and convincing evidence that to support that pleaded assertion, as the Rule requires.

8. The sole affidavit attached to the said Petition is not sufficient to show clearly and convincingly that Mr. Horton appears ***presently*** to be causing

great public harm. The Affiant, Mr. Herdeker, has no personal knowledge of the underlying events; he merely heard and then paraphrased Mr. Horton's deposition testimony. The Affiant's only personal knowledge pertinent to this case stems from his forensic review of Mr. Horton's trust accounting records, which solely concern past events, and that opinion is not relevant to the question of whether Mr. Horton presently appears to be causing great public harm.

9. The Bar's Petition does not explicitly expound or set forth the clear and convincing evidence of the presence of great public harm that is necessary to support a Petition under Rule 3-5.2 (a)(1).

10. Mr. Horton is 68 years old. He was admitted to the Florida Bar in 1974 and has no disciplinary record. He has practiced law for 43 years in Clermont, Florida.

11. In 2016, Mr. Horton's son, Michael G. Horton, joined his father's law firm and in January 2017, the name of the firm was changed from "Dennis L. Horton, P.A." to "Law Office of Horton & Horton, P.A." This was done because Mr. Horton intends to significantly reduce his workload and shift the work to Michael G. Horton in anticipation of his retirement from practice. The Florida Bar knew this when it filed its Petition.

12. Mr. Horton understands the gravity of the Bar's allegations, but he objects to the extreme remedy and procedure that the Bar elected to pursue, that of

an *ex parte* emergency suspension. Mr. Horton believes the Order of Emergency Suspension was pursued in an over-zealous manner, absent the requisite level of proof, and that this case should more rightly proceed with the full due process rights normally accorded to any other member of The Florida Bar in a regular attorney disciplinary proceeding.

13. Before the Bar filed its Petition for Emergency Suspension on May 1, 2017, Mr. Horton offered to waive probable cause if the Bar would simply treat this case in the usual manner of a Bar disciplinary case; that is, a filed Complaint (which the Petition now operates as), an Answer with defenses, motion practice and discovery, and ultimately a disposition by verdict or settlement. There simply is no basis or need to suspend this man's license other than to harass and vex him.

14. After a lifetime of service as an attorney, Mr. Horton simply wishes to be accorded the same treatment the Bar accords the multitude of lawyers who do not, for whatever reason, maintain their trust accounts in substantial compliance with the trust accounting rules. So many other lawyers are not treated as a "public danger" without clear and convincing evidence of present, ongoing harm.

15. Mr. Horton will agree and stipulate that he will not disburse, transfer or otherwise access any funds in any account that he or his law firm own, control, or have legal access to during the pendency of any Bar disciplinary proceeding at the following banks (excepting any personal account that he owns):

a) CenterState Bank, 1105 West Broad Street, Groveland, Florida;

b) First Green Bank, 1391 Citrus Tower Blvd., Clermont, Florida;

c) J.P. Morgan Chase Bank, 25 E. Church St., Orlando, Florida;

d) Seacoast Bank, 150 N. Orange Avenue, Orlando, Florida;

e) First Nat'l Bank of Mt. Dora, 714 Donnelly Street, Mt. Dora, Florida;

f) SunTrust Bank, 200 S. Orange Avenue, Orlando, Florida.

16. Mr. Horton owns a personal account at CenterState Bank, which has no nexus to his law practice or this proceeding; however, the broad stroke of the Order of Suspension and the Bar's overbroad advice to these bankers may prevent or preclude him from using his own personal funds.

17. This Court's Order entered *ex parte* on May 3, 2017 ordered Mr. Horton to notify each and every client of his of the fact of his suspension and to copy each client on the Order of Emergency Suspension. That is grave enough harm already inflicted in an *ex parte* context. It is exceedingly embarrassing to a lawyer of advanced years with an unblemished disciplinary record and a reputation of longstanding in a small town.

18. More to the point, the Bar's *ex parte* pleading to this Court alleged a present tense, ongoing "great public harm" actively being perpetrated by Mr. Horton, which allegation does not comport with the requirement of complete candor in an *ex parte* pleading, as the pleading omitted pertinent facts adverse to

the Bar's position, which facts The Florida Bar knew or should have known at the time it drafted and filed the Petition in this Court.

19. Had the Bar proceeded under the emergency suspension rule with complete candor, and with clear and convincing evidence of present and ongoing great public harm, the Court may have ruled differently on the Petition. The gravamen of this Motion is that the Petition was not completely candid and was not supported by the required clear and convincing evidence of great harm presently going on.

20. The Petition for Emergency Suspension was filed May 1, 2017 at 3:29 p.m. and this Court entered its Emergency Suspension Order on May 3, 2017 at 11:50 a.m. The Rule, 3-5.2, does not permit Mr. Horton to respond. This case began, as do all proceedings initiated under Rule 3-5.2, as an *ex parte* proceeding, since this Court relies solely on The Florida Bar's *ex parte* allegations.

21. The Bar cannot dispute that the vast majority of its prosecutions are not initiated by Rule 3-5.2, the emergency suspension rule. In the great majority of cases, Bar counsel forwards the file to a local grievance committee. If a committee finds probable cause, the Bar files a Complaint and the case proceeds before a referee, with an Answer, motion practice and discovery, until either a settlement or verdict recommendation is reached. Such is a "regular" Bar case.

22. The overarching distinction between a regular Bar prosecution and a

proceeding under Rule 3-5.2 is that Rule 3-5.2 requires clear and convincing proof of "present, great public harm." A good example is the case of Timothy Patrick McCabe. *See* Exhibit 2A, (Referee report) and Exhibit 2B, (news account).

23. Exhibits 2A and 2B tell us that in April 2013, Mr. McCabe abandoned his law practice and absconded with $6 million of client funds from 73 law clients. He was charged with federal crimes and was on the run for over two months. On April 16, 2014, the Bar filed a Petition for Emergency Suspension. (This was after the Bar had filed a Complaint against Mr. McCabe, and had defaulted him; he later also was defaulted on the Petition.) The McCabe case illustrates the necessary and proper use of Rule 3-5.2, as the evidence of present tense, "great public harm" was palpable, clear, and convincing. In this, however, such evidence is wanting.

24. The instant case presents no emergency. The Florida Bar knew that its complainant, Mr. Horton's friend and client, Edward Lowman, had voluntarily loaned Mr. Horton $90,000. Mr. Lowman is fully competent. Any issue of failing to advise Mr. Lowman that he should seek the advice of another lawyer regarding the loans is one that does not create a need for emergency suspension. The fact that Mr. Horton paid back the loans with interest in February 2017 takes this particular issue out of the purview and purpose of Rule 3-5.2, as any emergency that might have existed was mooted by Mr. Horton's repayment with interest.

25. Mr. Lowman's complaint is the only one that was filed. No one else

has complained. Bar counsel could have forwarded this to a grievance committee for further investigation but instead elected to investigate the matter further, using a subpoena issued by the grievance committee. *See* Exhibit 3.

26. The grievance committee subpoena commanded Mr. Horton to produce his original client files on nine (9) different law clients. Mr. Horton produced those, although he could have objected based on client confidentiality. Of the nine clients whose files were subpoenaed, three resulted in allegations of rules violations: a) Edward Lowman (discussed above); b) Christa Barry, and c) Richard O'Connell. Not one of the violations the Bar has alleged as a result of its intrusive inquiry into these various clients' matters constitutes the type of present tense, "great public harm" that prompts the nuclear option of emergency suspension. The Bar essentially insinuates that Mr. Horton charged Ms. Barry and Mr. O'Connell too much. Even if true, that does not constitute any sort of present emergency contemplated by Rule 3-5.2.

27. For his part, Mr. O'Connell disagrees that Mr. Horton has charged him too much, and he became angry when he learned that the Bar had obtained his banking information. He would disagree that any sort of emergency is extant.

28. The allegations regarding Mr. Horton's representation of Christa Barry and her Estate involve his collecting advance fees as the estate's lawyer and its named personal representative. The issue of whether his fee was taken improperly

or was "clearly excessive" under Rule 4-1.5(a) or the probate code will be decided by the probate court. The ultimate fee for his extraordinary work in that case is a matter of statute, and a rule of reason – the outcome of which issues The Florida Bar cannot possibly forecast. In any event, such an allegation or issue poses no emergency sufficient to trigger a proceeding under rule 3-5.2.

29. The allegations regarding Mr. Horton's representation of Richard O'Connell take up four full pages in the Petition for Emergency Suspension. A close reading of the allegations reveals that the last date of such alleged wrongful activity was July 11, 2016, nearly a year ago. This fact refutes the allegation of any present emergency. Although the Bar's insinuation is palpable, there is no allegation that Mr. O'Connell is incompetent; indeed he is not. Nor did Mr. O'Connell file any complaint with the Bar.

30. Any fire that might exist in the smoke of the Bar's four pages of banking activity relating Mr. Horton's interactions with Mr. O'Connell could have simply been referred to a grievance committee in the course of a regular attorney disciplinary proceeding. The Bar's pleaded admission that Mr. Horton's last "at issue" use of a Power of Attorney (that Mr. O'Connell freely provided) occurred almost a year ago destroys its argument that an emergency existed regarding Mr. O'Connell.

31. In the final end, the Bar knew that Mr. Horton was actively moving

toward retirement and in fact has sold the law firm to his son, Michael G. Horton. The Bar knew that Mr. Horton's liquidity trouble, which had prompted him to borrow money from his friend, Deborah Wade, and from his friend and client, Edward Lowman, had resolved itself through Mr. Horton's sale of his commercial property months before it filed its Petition for Emergency Suspension.

32. This pro forma suspension, signed by the clerk of the supreme court, *ex parte*, has unnecessarily disrupted the functioning of the Horton firm and its many clients. The Bar knew or should have known that its allegations presented nothing more than an ordinary attorney disciplinary proceeding and not an emergency. The Bar knew or should have known that there was no clear and convincing evidence of great public harm being presently inflicted, or at hand, when it filed the instant Petition.

33. If this emergency suspension is terminated, the unnecessary harm to Mr. Horton and his clients will at least be mitigated. (He already has had to notify all his clients of the fact of his suspension.) This case could proceed as a regular Florida Bar disciplinary case. Termination of the suspension will not result in any harm to the Florida Bar or the general public.

34. Mr. Horton has already notified all clients in his active probate cases that he is withdrawing from the representation and that they have the right to continue with the law firm, with Michael Horton as their attorney, or they can

choose any other lawyer. Thus, any emergent harm imagined by the Bar has already had its intended adverse effect, since Mr. Horton's representation has been "immediately" truncated by his compliance with the subject Order. The only just and proper thing for the Court to do under these facts and circumstances is to terminate the suspension so that Mr. Horton may at least assist his son in any cases the firm may be able to retain, and that will at least mitigate the damage caused by the Bar's improper and unwarranted use of Rule 3-5.2 in this case.

WHEREFORE, the Respondent, Dennis L. Horton, through undersigned counsel, respectfully requests entry of an Order terminating the Order of Suspension entered *ex parte* in this case, or in the alternative, amending or clarifying the Order so as to allow the law firm's other attorney, Michael G. Horton, to legitimately access and use the firm's operating and trust accounts so as to not harm the many innocent clients whose interests are unnecessarily and adversely affected by the emergency suspension order, plus any and all such further relief that this Court should deem just and fair under the circumstances.

CERTIFICATE OF SERVICE

I CERTIFY that this paper with Exhibits were furnished per Rule 2.516 to Carrie C. Lee, Esq., at clee@floridabar.org, with copies to mcasco@floridabar.org, aquintel@floridabar.org, avanstru@floridabar.org, at The Florida Bar, 561 E. Jefferson Street, Tallahassee, Florida 32399 on May 12, 2017.

Brett Alan Geer

BRETT ALAN GEER
The Geer Law Firm, L.C.
3030 N. Rocky Point Drive W., #150
Tampa, Florida 33607-7200
(813) 961-8912
(813) 265-0278 Facsimile
Florida Bar Number 61107