IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellant, Case No: SC17-782

v.

DENNIS L. HORTON,

Appellee/Cross-Appellant.

_____/

MOTION FOR REHEARING

Appellee, DENNIS L. HORTON, through undersigned counsel, respectfully submits this Motion for Rehearing under Rule 9.330, Fla. R. App. P., based on the Court's opinion rendered August 29, 2019, and states that there are three areas of concern deserving of rehearing or clarification. Mr. Horton asserts that these issues are based on specific points of law or fact that were overlooked or misapprehended in the Court's decision. The purpose of rehearing being solely to correct these types of errors, the three areas of concern are:

1) The assertion that Mr. Horton waived his constitutional claims;

2) The reversal of the referee's finding that Mr. Horton was "contrite and generally remorseful"; and

3) The lack of clarity in the opinion that, while Mr. Horton may have mishandled client funds, there is no finding and no evidence that he converted or misappropriated the same.

I. Constitutional claims

The opinion stated that Mr. Horton "challenges the constitutionality of Rule Regulating the Florida Bar 3-5.2 governing emergency suspensions. We have considered Horton's challenge and find that he waived this claim by not litigating it when his emergency suspension was at issue before this Court." Mr. Horton is uncertain what the reference to "this Court" means, as this case has always been in this Court as an original proceeding.

Because attorney disciplinary proceedings are original proceedings in this Court, there is never a "lower tribunal." A referee sits by assignment in this Court as the trier of fact and law. This Court suspended Mr. Horton summarily under R. Regulating Fla. Bar 3-5.2 without affording him any opportunity to respond before it ordered the assignment of a referee. Every notice, motion and pleading filed in this case has carried the heading "In the Supreme Court of Florida."

The Bar filed a lengthy Petition for Emergency Suspension on May 1, 2017, totaling hundreds of pages. A mere 36 hours later, the Court suspended Mr. Horton's law license based on that ex parte proceeding without affording him any real opportunity to be heard, and directed the assignment of the case to a referee. Before the referee, Mr. Horton answered the numbered allegations of the Petition and he included affirmative defenses and a motion to dismiss. The demurrer was

predicated on his first affirmative defense, set forth here in its entirety:

> "1. Unconstitutionality. The rule of court by which The Florida Bar has petitioned for emergency suspension, Rule 3-5.2, is unconstitutional on its face, and as applied to this case and Respondent. While the rule appears to provide a right of substantive and procedural due process to challenge the sufficiency of a Petition filed under the rule, in reality no such right of due process is provided to this Respondent or any respondent in seeking to challenge ot dismiss a Petition filed by the Bar under said rule."

At the very first hearing before the referee, Mr. Horton fully argued the basis of this affirmative defense. *See* Transcript of Hearing, May 19, 2017, p. 7, line 8 to p. 10, line 16. By a Notice of Filing dated May 4, 2018, Mr. Horton filed that transcript in this Court, with the referee. The arguments that were ultimately briefed to this Court on appeal were made in that initial hearing. Mr. Horton has argued this issue consistently from the beginning. The only one who listened was the Hon. Phillip Pena, who essentially ruled that he had no authority to rule on the claims. *See* Transcript of Hearing, May 19, 2017, pp. 29-31.

This is an adversarial proceeding "of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *cf. In re Gault*, 387 U.S. 1, 33, 87 S.Ct. 1428 1446, 18 L.Ed.2d 527. An attorney subject to sanctions is entitled to due process, which includes "fair notice that [his] conduct may warrant sanctions and the reasons why," as well as the opportunity to respond. *In re Mroz*,

65 F.3d 1567, 1575 (11th Cir. 1995) (emphasis added).

Florida courts have consistently recognized that due process entitles a litigant to notice and an opportunity to be heard. *See, e.g.*, *Florida Bar v. Fredericks*, 731 So.2d 1249, 1254 (Fla.1999) ("Accordingly, because Fredericks was made aware of the conduct alleged by the Bar to be unethical and had the opportunity to be heard as to this conduct, there was no violation of due process."); *Florida Bar v. Rubin*, 709 So.2d 1361, 1363 (Fla.1998) ("Prior to being found guilty of the charges at issue here, Rubin was afforded appropriate notice and a full opportunity to be heard during the final hearing before the referee. This was sufficient to satisfy the demands of due process."); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 655, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (holding that where appellant was put on notice of disciplinary charges against him and was afforded opportunity to respond to board's recommendation, demands of due process were satisfied); *In re McKay*, 280 Ala. 174, 191 So.2d 1, 5 (1966) ("An attorney must be accorded due process in disciplinary proceedings, and the requirements of due process are met when the attorney is served with charges or specifications reasonably informing him of the charges against him and the attorney is thereafter accorded a hearing with an opportunity to defend.").

Mr. Horton was not afforded any reasonable opportunity to be heard before

his law license was summarily suspended. He never waived his constitutional claims. The referee essentially advised the parties that the full Court would have to address the constitutional claims; however, the full Court has now stated otherwise. It cannot be both.

II. The Court was misled regarding the finding of remorse.

The Court reversed the referee's ruling regarding Mr. Horton's remorse as a factor in mitigation of the sanction, based on some exasperated remarks appearing in the record. The remarks at issue, read by the Bar in oral argument and highlighted by the Court in its opinion, are divorced from their proper context and as such are insufficient to reverse or ignore the finding of remorse made by the referee.

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. *Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003). While the remarks at issue were made by Mr. Horton, the referee nonetheless found that Mr. Horton was generally contrite and showed remorse. Report of Referee, p. 30. The referee made that finding after witnessing his demeanor throughout the case and after watching him testify over two days. That cannot be over-emphasized.

The referee's assessment of a witness's credibility is reviewed for abuse of discretion. *Florida Bar v. Charnock*, 661 So.2d 1207, 1209 (Fla. 1995). The

referee did not abuse his discretion in this regard. Mr. Horton does contend that the Court's reversal on this point was predicated on a false impression of the record.

Certain statements that Mr. Horton made at his sanctions hearing were read aloud by the Bar, out of context, at oral argument. The Court reprinted those parsed statements in its opinion. In reality, when Mr. Horton made the subject remarks, he was reflecting on the effect that his emergency suspension had had on his practice, his relations, his charitable endeavors and his family, to wit:

> "So talk about hurt, yes. Sunday school class, we went to the next -- two days after the TV. It was hard, because now it was plastered all over the Orlando newspaper and the TV. We went and had people in our Sunday school class come up -- come up and ask you about it. Difficult. There should have been an easier way for -- it seemed like we got the cart before the horse. The punishment was given without me having the ability to present my side with this emergency suspension."

Transcript of Hearing, sanctions, p. 90, lines 13-21. (Emphasis added.)

Mr. Horton continued to describe how the emergency suspension had affected him. He was not speaking of the prosecution. Reprinted here are the full, in-context remarks Mr. Horton made to that effect at the sanctions hearing. The words that the Bar removed from their proper context are *italicized*, while the passages proving that Mr. Horton was referencing the ex parte order of suspension are underlined...

"You asked me how I felt, and I just feel like maybe some rules have been violated, but not intentionally. No money is missing. No one was harmed."

"The punishment I've received so far with the suspension and what I was ascribed to was not fit for the rule violations alleged on a six month suspension. Newspaper articles, TV's clip. *Today was like trying to kill an ant with a sledge hammer, or it feels like. Throughout the Bar investigation and being looked at by the Bar, prosecuted as a trophy being hunted for the kill so my head could be mounted on their wall as trophy killing, trophy to hunt.* Sixty-nine years old, 43-year Bar member with no prior complaints. I just should have been treated better than when you call a person a great public harm. It's been surreal. I mean, it's just—that's all I can think of is surreal. It's not really happening. Yes, it is. It's like facing a firing squad for a traffic violation and being paraded through Clermont in handcuffs in prison clothes before any opportunity to be heard. Taking away from me my 43-year good reputation before I have the ability to be heard.

"I can't get that reputation back. The damage had been done even if I was to be completely innocent or exonerated, if I was found that by the judge. Even a person accused of a crime has more rights than I was given. Being sentenced severely before a trial or proven to be -- it's like being sentenced before trial, before having your case before the court, before being proven to be guilty."

Transcript of Hearing, sanctions, p. 99, line 19 to p.100, line 24. (Emphases added.)

No lawyer can reasonably argue that they would not be frustrated, even

angry, at not having been afforded the opportunity to be heard before being exposed to the public opprobrium that goes with being emergency suspended. Mr. Horton had cooperated fully with the Bar during a months-long inquiry, and felt that the resort to the emergency suspension rule was unreasonable and excessive.

The way the Bar argued against the finding of remorse has adversely affected the impartiality of the Court. The referee, Judge Pena, did a superb job in a detailed and contested case. He heard and watched Mr. Horton utter the statements, which the justices of the Court did not do. Afterward, Judge Pena found that Mr. Horton was contrite and generally remorseful by his demeanor.

Upon the Bar's oral argument, in which it selectively parsed Mr. Horton's remarks, the Court had no questions. But the Court did ask undersigned counsel if he could point to the record where Mr. Horton exhibited remorse. That was a loaded question. Counsel knew that Mr. Horton had never expressly stated: "I am remorseful," and so he answered the question in the negative—which is now published as a footnote in the opinion.

The Bar importuned the Court to reverse a thoughtful finding by the referee by the shopworn tactic of taking words out of proper context; this can be described as tantamount to bad faith or misleading the Court. The Court did not appreciate the utter frustration that a lawyer in Mr. Horton's position would feel after spending a

lifetime in the law—only to be shown that he does not enjoy the basic civil rights that a citizen has because he happens to be a lawyer. As Mr. Horton pointed out, the damage was done before he ever got a chance to respond. That is what he was speaking about. The referee understood that; bar counsel understood that. It is evident beyond dispute that the Bar intentionally severed the remarks (italicized above) from their true context, which the Court then adopted to justify reversal of the referee's finding. The referee has not been shown to have abused his discretion.

The true context is that, in his soliloquy, Mr. Horton was expressing a disbelief and a deep frustration at having had his basic rights denied by this Court. This case began with an ex parte proceeding in which he had no opportunity to be heard before the Court summarily suspended his law license after 43 years of unblemished service to his community. He has bridled against that since day one. Not only has the Court ignored his due process claim, it ignored the Bar's role in filing this case in violation of the rule governing ex parte proceedings, as the briefs have explained. It was unseemly and unprofessional for The Florida Bar to lift his words from their proper context merely to inflame and mislead this Court as to the true context and meaning.

The fact that The Florida Bar is an official arm of the Court means that the Court has a vested interest in promoting the Bar's mission. The Court should not

seek to protect the Bar's mission, however, at the expense of basic civil liberties, or by failing to address improper conduct by any lawyer. With respect, the Court should avoid lending the impression that the Court will adopt any argument the Bar makes in these attorney disciplinary cases, and will sign off on anything The Florida Bar puts in front of it. The way this case was presented and finalized does nothing to keep such an impression from metastasizing.

Mr. Horton believes the Court misapprehended the meaning of his out-of-context words, and thus mistakenly discounted and overruled a correct finding by Judge Pena, who watched Mr. Horton's demeanor and heard his live testimony over two days before finding that he was "contrite and generally remorseful." Mr. Horton's use of folksy colloquialisms to express his frustration over the due process violations should not have been used derisively, to overturn that finding.

III. <u>The record does not support misappropriation of client funds</u>.

The Court was mistaken in concluding that Mr. Horton "transferred funds from R.O.C.'s account for his own personal benefit, knowing that he was not entitled to those funds." Opinion, p. 12. As to Richard O'Connell, only two witnesses testified regarding the Court's conclusion that Mr. Horton wrongfully took money from Mr. O'Connell. Those were Mr. Horton in live testimony and Mr. O'Connell by affidavit. While Mr. Herdeker, the Bar's auditor, did relate one

instance of Mr. Horton withdrawing funds from Mr. O'Connell's bank account directly to pay for his own purpose, the auditor had no way of opining whether Mr. Horton had earned the money when that occurred. Mr. Horton offered testimony and documents that showed that his fees were earned, and that evidence was not rebutted. Mr. O'Connell testified that he understood what Mr. Horton was doing for him and that he understood the fees he was charging. Mr. O'Connell stated that the fees were fair and that he was satisfied with the services.

The referee, Judge Pena, understood the disabilities in the Bar's case and also understood why Mr. Horton was aggrieved at the lack of due process afforded him in this case. The Court should have considered these same matters in considering the referee's recommendation as to the proper sanction.

To avoid misapprehension as to the true facts, the Court should clarify that there were no monies paid to Mr. Horton from Mr. O'Connell or the Christa Barry Estate that were proved were not earned and owed to him in representing those two clients.

The Court's opinion reads like Mr. Horton stole a whole bunch of money from elderly clients. That is not true. At the very least, that impression must be clarified, as there is insufficient evidence and no finding to support that impression.

WHEREFORE, Appellee, Dennis L. Horton, through undersigned counsel,

respectfully requests rehearing and/or clarification on the issues and the premises stated herein above, plus any and all such further relief as justice and equity require.

CERTIFICATE OF SERVICE

I CERTIFY that this paper was e-filed through the Court's portal and served per Rule 2.516 to Appellant at clee@floridabar.org, asackett@floridabar.org, on September 13, 2019.

s/ 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
brettgeer@geerlawfirm.com
info@geerlawfirm.com