IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC00-579

vs.

TFB File No. 99-00,433 (02)

JOHN A. BARLEY,

Respondent.
_____/

ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities Cited

Rules Regulating The Florida Bar

Miscellaneous

PRELIMINARY STATEMENT

Respondent, John A. Barley, seeks review of the emergency suspension order and the proceedings held in respect to that order entered in Supreme Court case number SC95168 (TFB File No. 1999-00987-02-NES) and also seeks review of the findings of fact and recommended discipline from the Report of Referee entered in Supreme Court case Number SC00-579 (TFB File No. 1999-00433(02). **Respondent**, will be referred to as Respondent, or as Mr. Barley throughout this brief. Complainant, The Florida Bar, seeks cross-review of the referee's recommended discipline in Supreme Court case Number SC00-579 (TFB File No. 1999-00433(02). **The Florida Bar**, will be referred to as such, or as the Bar.

References to the Report of Referee shall be by the symbol **RR** followed by the appropriate page number.

References to the transcript of the hearings before the Referee shall be by the symbol **TR** followed by the date and the appropriate page number.

References to Respondent's initial brief shall be by symbol **IB** followed by the appropriate page number.

References to specific pleadings will be made by title and, if contained in Respondent's Appendix, will be additionally referred to by the symbol **APP** followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Brief Summary of Facts

Mr. Barley was hired by Warren Emo as corporate representative of ArC/Masterbuilders. Mr. Emo deposited $76,760.69 on October 30, 1997, to fund a potential settlement. The settlement did not go though as anticipated. Mr. Barley began making draws against the funds in trust on November 5, 1997, until the funds were exhausted on February 13, 1998. Mr. Barley took trust funds deposited for the specific purpose of funding a settlement, without the authorization of his client.

Response to Mr. Barley's Statement of Facts

The Florida Bar does not dispute the chronology laid out by Mr. Barley's Initial Brief to the extent that certain documents were filed, or hearings were held, on the dates as specified. IB pp 1- 20. That is not to say, however, that the Bar agrees with every categorization of the nature of the hearings, nor every description of the documents as given by Mr. Barley. The documents and transcripts of the hearings speak for themselves. Furthermore, the Bar believe that anything occurring before the filing of the Complaint on March 17, 2000, is not incorporated in the procedural record of this case, with the exception of the specific documents introduced in the trial before Judge Bean. In other words, while the Bar does not dispute that certain events took place on the dates Mr. Barley indicates in his brief, the Bar does dispute that those facts are before this Court, in this record.

In an abundance of caution, and considering the possibility that the Court might entertain and address the issues raised by Mr. Barley with respect to Supreme Court case number SC95168 (TFB File No. 1999-00987-02-NES), the Bar wishes to add a few relevant facts that Mr. Barley neglected to mention.

Mr. Barley forgot or neglected to mention that a telephonic hearing with Judge Murphy took place on May 10, 1999, with Mr. Barley present with his counsel and Mr. Spangler appearing on behalf of the Bar. At that time, the parties and the referee mutually agreed to set a hearing for May 28, 1999. That hearing was rescheduled, *at the request of Mr. Barley*, to June 4, 1999, so that he could be present at another hearing. (See Respondent's Emergency Motion for Stay of Suspension or, In the Alternative, Motion for Clarification, dated May 28, 1999).

Mr. Barley also forgot or neglected to mention that Judge Murphy's Report of Referee, while recommending that the Motion for Dissolution be granted also found that Mr. Emo had deposited $76,760.68 in Mr. Barley's trust account for the specific purpose of funding a proposed settlement, that the anticipated settlement did not occur, that Mr. Emo and Mr. Barley agreed to keep the funds in the trust account as a sign of good faith, that Mr. Barley began drawing funds on November 5, 1997, and continued to draw from those funds until the funds were exhausted on February 13, 1998, that the draws did not correspond to the billings, that Mr. Barley commingled funds, that Mr. Emo had made verbal and written demands for return of the funds,

and that Mr. Barley did not have any written authorization from his client to draw on the funds. (Murphy RR p. 2 para 4). Mr. Barley also neglected to mention that Judge Murphy, both at the June 4, 1999 hearing and in his Report of Referee, requested that another judge be assigned to hear any future related cases.

Respondent neglected to mention that he filed a Motion for Continuance on May 8, 2000, the same day he filed his belated Answer to the Complaint, Answer to Request for Admissions, Motion to Set Aside Default, and Motion to Abate. By failing to timely respond to the Complaint, by requesting a continuance, and by requesting that the case be abated until after September 11, 2000, it became impossible to for the referee to file his report within 90 days of March 22, 2000.

Mr. Barley further neglected to mention that the hearing before Judge Bean on October 20, 2000, began with Mr. Barley making a renewed request that the case be abated. (TR 10/20/2000 pp 4-19). Mr. Barley also requested that the hearing scheduled for November 21, 2000, be rescheduled to allow him to be at work on that day, understanding that Judge Bean did not have any other hearing dates available until January. (APP p. 929 - 930). He made this request two weeks after filing an objection to the Bar's request for additional time to file the report of referee. (App 927-928). Mr. Barley again requested additional time at the January 10, 2001, hearing on discipline to submit written closing argument. (TR 1/10/01 pp 598 - 602). Eventually, he agreed to submit his closing argument by January 16, 2001. On

January 16, 2001, Respondent asked Judge Bean for an additional day to submit his closing argument. The next day, Respondent submitted a twenty five page Motion to Reconsider Report of Referee as to guilt and requested, by separate letter, additional time to submit his closing argument. Mr. Barley never submitted his closing argument. The referee entered his Report of Referee on January 25, 2001.

Mr. Barley also neglected to mention the twelve motions he filed seeking additional time to prepare his initial brief.

Statement of Facts from Judge Bean's Report of Referee

The Florida Bar adopts the Findings of Facts made by Judge Bean, acting as referee. They are reprinted below for the reader's ease.

The Referee finds that The Florida Bar has proven, by clear and convincing evidence, the following facts:

1. Warren Emo, in his capacity as president of ArC/MASTERBUILDERS, Inc., deposited $76,760.68 in Respondent's trust account for a specific purpose, i.e., to fund the settlement according to the terms of Respondent's October 29, 1997 letter addressed to Marion D. Lamb, III (**Bar's Exhibit 4**). The fact that the purpose was rendered moot by the failure of the parties to agree to settlement terms on October 30, 1997 did not change the character or nature of the funds.

2. The evidence supports a determination that Mr. Emo consistently demanded, in written form, the return of the funds, and never authorized their use as an advance toward unearned attorney's fees.

3. Mr. Emo first learned that the funds had been drawn down on December 23, 1997 in a phone conversation with Respondent. When Mr. Emo asked for return of the funds, Respondent informed him for the first time that the funds had been overdrawn. When Mr. Emo inquired how much was left, Respondent told him that the overdraft approximated $23,000, but that Respondent was anticipating a large settlement and would soon be in a position to make good on the shortage.

4. Instead of paying Mr. Emo the balance that remained in his trust account as of that date, Respondent continued to withdraw the remaining trust funds until the entire $76,760.68 had been withdrawn by February 13, 1998.

5. On January 26, 1998, Mr. Emo wrote the first of five (5) written demands for return of the funds (**Bar's Exhibit 7**). He followed up by faxing the same letter to Respondent on February 27, 1998, wrote again on March 3, 1998 (**Bar's Exhibit 8**) and again on September 9, 1998 (**Bar's Exhibit 9**) and September 14, 1998.

6. Respondent offered one item of written corroboration, an office memo written by his bookkeeper, Deborah Browne, purporting to memorialize instructions from the client authorizing the use of the funds, dated November 5, 1997, the date upon which he made the first withdrawal of funds. No copy of this memo, or any

other written confirmation of that purported authorization, was sent to Mr. Emo. Deborah Browne was not called to testify as to the legitimacy of the memo purportedly authored by her.

7. Despite Respondent's testimony to the effect that upon receipt of each of the written demands for return of the funds he telephoned Mr. Emo and received verbal assurance that he could continue to use the funds, there is no documentary evidence memorializing said telephone conversations.

8. The detailed invoices prepared by Respondent contain multiple entries of "telephone with Mr. ____; draft memo to file", but Respondent has not produced any such "memo to file" he may have drafted following the alleged telephone conferences with Mr. Emo in which Mr. Emo allegedly receded from his demand for return of the funds. In none of the subsequent written communications emanating from Mr. Emo is there any reference to an agreement contrary to the previous written demand for return of the funds.

9. Respondent's testimony to the effect that he had a telephone conversation with Warren Emo on October 30, 1997, at which time he told Mr. Emo that the check for $76,760.68 had been deposited in his trust account, and that there was no point in allowing it to remain there unless Mr. Emo wanted it to remain, and at that point Mr. Emo told him to keep it in the trust account, contradicts his own affidavit in which Respondent stated, on page 10 (**Respondent's Exhibit 16**), that he had encouraged

Mr. Emo to leave the funds on deposit as a show of good faith to counsel for Slab Construction, to substantiate the representation that Mr. Emo wanted to settle the case and had the settlement funds available for that purpose.

10. Respondent's affidavit (**Respondent's Exhibit 16**) is consistent with the testimony given by Warren Emo, in which he stated that Respondent virtually insisted that the $76,760.68 remain in the trust account to insure that Mr. Lamb, Slab's attorney, would no longer abstain from prosecuting his third party complaint, and would join forces with ArC/MASTERBUILDERS' opponents.

11. There is substantial evidence in the record to support the inference that Respondent used this technique to manipulate Mr. Emo into allowing the funds to remain in his custody so that he might avail himself of the use of those funds in a manner contrary to the purpose for which they were deposited. The Bar's evidence supports the inference that Respondent intended to avail himself of those funds at the time he persuaded Mr. Emo to leave them in his trust account, as evidenced by the fact that immediately following his persuading of Mr. Emo that the funds had to remain on deposit he began to withdraw those funds for his own unauthorized purposes. The record contains undisputed evidence that Respondent made the first $500 withdrawal of funds on November 5, 1997 (**Bar's Exhibits 14 & 15**), less than a week after Mr. Emo had been persuaded to leave the money in the trust account. Thereafter, there began a systematic withdrawal of the funds over the ensuing three and one-half

months. Further, the dates and amounts of the withdrawals bear no correlation to the dates or hours being invoiced by Respondent.

12. The record establishes that Mr. Emo paid seven (7) invoices prior to depositing the funds in Respondent's trust account (**Bar's Exhibit 3**) and another invoice afterward (**Bar's Exhibit 6**). The invoices were rendered on an average of every 11.7 days, and were paid on an average of 4.1 days after the invoice date. Mr. Emo advanced fees to Respondent on request on at least three (3) occasions (**Bar's Exhibit 3**). As of October 30, 1997, the date of the trust fund deposit, Respondent had been paid $50,571.41 in fees and costs during a three month period, and was paid an additional $11,947.33 on November 21, 1997, for a total of $62,518.74.

13. The evidence does not support a finding of a decision having been made by Mr. Emo to deposit $76,760.68 in Respondent's trust account as an advance toward unearned fees, nor is there any logical basis for concern on Respondent's part that legitimate fees earned in the future would not be timely paid. There is no basis for any belief that Respondent feared for non-payment of invoices, so as to justify his requirement that Mr. Emo leave such a disproportionate sum of money in his trust account for that purpose.

14. There is undisputed evidence that Mr. Emo paid Respondent three (3) advances for unearned fees, beginning with the initial deposit of $5000, followed by a $3000 advance paid on September 19, 1997, and $3500 paid on October 7, 1997

(**Bar's Exhibit 3**). It is also undisputed that Mr. Emo was given credit for all of these fee advances on the invoices provided by Respondent, dated August 15, 1997, September 25, 1997, and October 15, 1997 (**Bar's Exhibit 3**). However, none of the invoices rendered after Mr. Emo deposited the $76,760.68 in Respondent's trust account reflect such a credit balance.

15. Respondent testified that he had been suspended for sixty days in 1989. He asserted, however, that the Referee, Judge Arthur Lawrence, had found no intentional misconduct or misconduct involving moral turpitude. Judge Lawrence, however, made specific findings of fact in the Report of Referee (**Bar's Exhibit 18**) that Respondent began making unauthorized withdrawals from a $200,000 trust, of which he was the sole trustee of a trust he drafted, contrary to the provisions of a settlement agreement that there were to be three trustees. The Referee further found that Respondent also drafted a financial statement for the purpose of obtaining a loan on behalf of the trust, which failed to disclose a $47,500 loan he had obtained from his client without a written loan instrument. Respondent was found to have then effected a settlement, from which he took both an hourly fee and a contingent fee, contrary to his client's instructions. Judge Lawrence found that after having been discharged by the client, Respondent drafted three separate notes to document the $47,500 loan and backdated the notes to January and February, 1982. The Referee recommended, and the Supreme Court found (**Bar's Exhibit 19**) that Respondent had

violated disciplinary rules of the former Code of Professional Conduct 2-106(A) (entering into an agreement for or charging or collecting an excessive fee) and 9-102(B)(4) (failing promptly to pay over funds, securities or other property which the client is entitled to receive). Such misconduct is similar to that which is charged here.

16. Mr. Emo paid Respondent's invoices promptly and without protest despite his misgivings. His reasons for doing so did not arise from a belief that the fees were reasonable and had been earned, but rather out of a sense of his being "held hostage" by the circumstances of the litigation and negotiations in which his firm had become embroiled, i.e., that he had employed Respondent when his first lawyer developed a conflict and had to withdraw; that he employed Respondent with the knowledge that the first lawyer's legal fees for the first six months of representation had amounted to approximately $10,000; that he discovered that Respondent's fees were going to far exceed his previous experience ($50,000 in the first three months) but felt that he had no choice but to continue with Respondent's representation because a.) he couldn't afford to pay a third lawyer to learn the case; b.) he was involved in acrimonious litigation with two large corporations represented by large and expensive law firms and didn't want to send a message of weakness or uncertainty; and c.) he felt the end was in sight.

SUMMARY OF ARGUMENT

This Court should refuse to entertain Mr. Barley's arguments relating to his emergency suspension. Those issues are not properly before this Court, have already been addressed in a separate, but related case, are moot, and have been waived.

If those issues are addressed, his request for relief should be denied because Rule 3-5.2, both as written and as applied to Mr. Barley, clearly provided adequate due process. Mr. Barley was noticed and heard both before and after a temporary suspension order was issued. Mr. Barley was not discriminated against, instead he was treated like any other attorney who takes trust account funds without authorization.

The referee's factual findings are supported by competent, substantial evidence from the record. But the recommended discipline is not supported by case law. Rather, the case law supports disbarment as the appropriate discipline in cases of misappropriation of trust funds.

ARGUMENT

I. MR. BARLEY SHOULD NOT BE ALLOWED TO RAISE ISSUES ARISING FROM ANOTHER, ALBEIT RELATED EMERGENCY SUSPENSION CASE, WHEN THAT OTHER CASE HAS ALREADY BEEN FINALLY ADJUDICATED AGAINST HIM BY ORDER OF THE SUPREME COURT OF FLORIDA, A REFEREE HAS FOUND HIM GUILTY BY CLEAR AND CONVINCING EVIDENCE OF VIOLATING NUMEROUS RULES, AND THE ISSUES WERE NOT RAISED IN HIS PETITION TO REVIEW.

Mr. Barely devotes the majority of his brief to issues relating to his emergency suspension under Rule 3-5.2, Rules Regulating The Florida Bar. The emergency suspension has already been adjudicated by this Court's Opinion and Order dated August 24, 2000, and made final on February 20, 2001, when this Court denied Mr. Barley's Motion for Rehearing, Second Motion to Dissolve, and Motion to Correct Administrative Errors. The Florida Bar v. Barley, 777 So.2d 941 (Fla. 2000). Mr. Barley had the opportunity to argue against the emergency suspension and he lost. He is now impermissibly raising these continuing arguments. If Mr. Barley wishes to continue to argue the propriety of the Court's and the Bar's actions with respect to the emergency suspension, he should seek review by the Supreme Court of the United States.

Additionally, issues relating to the emergency suspension are now moot. As stated in Godwin v. State, 593 So.2d 211, 212 (Fla. 1992):

> An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. Dehoff v. Imeson, 153 Fla. 553, 15 So.2d 258 (1943). A case is "moot" when it presents no actual

> controversy or when the issues have ceased to exist. Black's Law Dictionary 1008 (6th ed.1990). A moot case generally will be dismissed.
>
> Florida courts recognize at least three instances in which an otherwise moot case will not be dismissed. The first two were stated in Holly v. Auld, 450 So.2d 217, 218 n. 1 (Fla.1984), where we said: "[i]t is well settled that mootness does not destroy an appellate court's jurisdiction ... when the questions raised are of great public importance or are likely to recur." Third, an otherwise moot case will not be dismissed if collateral legal consequences that affect the rights of a party flow from the issue to be determined. See Keezel v. State, 358 So.2d 247 (Fla. 4th DCA 1978).

In this case, Judge Bean, as referee, held a hearing, took testimony, and accepted evidence from the parties. After the hearing, he found by clear and convincing evidence that Mr. Barley had violated rule 4-1.5(a) (Illegal, Prohibited, or Clearly excessive Fees), 4-1.15(a) (Clients and Third Party Funds to be Held in Trust), 4-1.15(b) (Notice of Receipt of Funds; Delivery; Accounting), 4-1.15(d) (Compliance with Trust Accounting Rules), 4-8.4(c) (Conduct involving dishonesty, fraud, deceit, or misrepresentation), 5-1.1(a) (Nature of Money or Property Entrusted to an Attorney) and 5-1.2(b) Minimum Trust Accounting Records) of the Rules Regulating The Florida Bar. RR 1/25/01, p. 10. The referee then recommended that Mr. Barley be suspended for three years, dating back to the date of his emergency suspension. Id. Mr. Barley, in accord with due process, had his day in Court and was unable to convince the referee that the Bar's allegations lacked merit or evidentiary support, while the Bar proved by clear and convincing evidence that Mr. Barley had violated numerous rules. If the proper issue to be determined before ordering an emergency

suspension is whether or not the Bar is likely to succeed on the merits, then the Bar has met that burden *by actually prevailing on the merits.*

Any possibility that attorneys in the future will be unsure of the meaning of Rule 3-5.2 was already alleviated by the reported opinion of this court rendered in The Florida Bar v. Barley, 777 So.2d 941 (Fla. 2000). There are no collateral legal consequences to be considered. The consequences to Mr. Barley are a direct result of his proven misconduct in taking trust funds without authorization. His requests for relief from the temporary suspension should be dismissed as moot.

Moreover, a review of Mr. Barley's Petition for Review reveals that he did not raise any issue relating to his emergency suspension or Rule 3-5.2 in that Petition. Therefore, he has waived any possible arguments that might have been made with regard to those issues.

II RULE 3-5.2 PROVIDES A CLEAR, WELL DEFINED METHOD THAT APPROPRIATELY BALANCES A RESPONDENT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AGAINST THE IMPORTANT INTEREST IN PROTECTING THE PUBLIC FROM UNTRUSTWORTHY ATTORNEYS

Assuming that Mr. Barley is entitled to raise issues relating his emergency suspension, his request for relief should still be denied because Rule 3-5.2 is not unconstitutionally vague, Mr. Barley was given his due process right to notice and an opportunity to be heard, and neither Rule 3-5.2, nor the application of the rule to Mr. Barley violated his equal protection rights as all attorneys are treated in the same manner under the rule and under Florida Bar policy.

Rule 3-5.2 provides the Bar with a mechanism for seeking emergency suspension or probation of an attorney. Before a petition seeking emergency suspension or probation may be filed with the Court, it must be approved by the president, president-elect, or executive director of the Bar. The petition must be supported by one or more affidavits demonstrating facts personally known to the affiants that, if unrebutted, would establish clearly and convincingly that an attorney appears to be causing great public harm. Upon receiving a proper petition, the Supreme Court *may* issue an order suspending the attorney or imposing conditions of probation on an emergency basis. Rule 3-5.2(a), Rules Regulating The Florida Bar. The Rule does not provide for *ex parte* petitions, therefore, the respondent is provided with a copy of the petition and given the opportunity to respond. Mr. Barley, through

counsel, responded within two days. The Court ordered the Bar to file a prompt reply to Mr. Barley's response. The Bar did so and Mr. Barley filed a supplemental answer which included a verified response to the allegations. The verified statement of Mr. Barley dated March 30, 1999, and attached to the April 1, 1999, Addendum to Response and Motion to Abate states in paragraph 3.2:

> On October 30, 1997, my law firm received and deposited in its trust account a check for $76,760.68 for payment to Slab if and when the settlement proposed in the 10/29/97 letter was closed. . . . I then telephoned Mr. Emo and related to him the information and advice I had received from Mr. Lamb [ie the settlement was unworkable]. I then told Mr. Emo it appeared any settlement would first have to be agreed to by CTV and ArC, and suggested that I continue the dialogue I had already initiated with Mr. Schmuck and Mr. Law toward achieving that end. Mr. Emo agreed and then asked whether it was necessary for the $76,760.68 my law firm had received from [sic] on October 30, 1997, to remain in my firm. I then told him that it was not necessary for those funds to remain with my law firm, but that Mr. Schwartz, Mr. Sivvyer, Mr. Lamb, Mr. Schmuck and Mr. Law had been told that those funds had been deposited with my law firm as an expression of ArC's good faith to settle on the terms proposed in the 10/29/97 letter, that if those funds were then returned to ArC, CTV may construe that move as a sign that ArC was changing his position on the settlement, and that the interests of ArC and Amwest would be better served if those funds remained in my law firm unless and until it became clear that ArC could not reach a settlement with CTV which would dispose of the Florida Mining law suit. (APP pp 115 - 117)

Then in paragraph 3.4, Mr. Barley states:

> Before concluding our telephone conversation on December 23, 1997, Mr. Emo asked me if it was any longer necessary for the Barley

> firm to continue to hold the funds it had received from ArC on October 30, 1997. *I then told Mr. Emo that my law firm had begun drawing against those funds to meet its operating expenses when it became apparent that such funds would not be used to pay Slab,* that the draws my law firm had made were based on the amount payable for the legal services my firm was rendering and the costs it was incurring in representing the interests of ArC and Amwest, that I would ask my law firm's bookkeeper to determine the amount which had been drawn from those funds to pay for such legal services and costs, and that I would telephone him to let him know the unexpended balance of those funds. . . . On December 24, I telephoned Mr. Emo and told him that the amount payable to my law firm for legal services rendered and costs incurred were miscalculated through miscommunications between me and my bookkeeper, *that my law firm had drawn approximately $23,000.00 more than what was payable for the legal services it had rendered and the costs it had incurred* . . . .(APP pp 118-119)

Therefore, even under Mr. Barley's own version of the facts, he had not notified or sought Mr. Emo's permission to draw against the funds deposited in the trust account to fund the settlement until after he had taken the funds and had taken approximately $23,000.00 more than Barley could claim as fees and costs. Mr. Barley's own verified statement, filed with the Court in defense against the issuance of a temporary suspension, supports the issuance of a suspension based on his admission of misappropriation of funds deposited for a specific purpose. Based on the affidavits provided by the Bar, and Mr. Barley's own admissions, the Court was authorized, perhaps even obligated, to temporarily suspend Mr. Barley's license to practice law.

Rule 3-5.2, as written and as applied, provided Mr. Barley with notice and an opportunity to be heard *prior* to his temporary suspension. But the Rule goes one step further and allows an attorney to file a motion for dissolution or amendment of the emergency suspension order at any time. Rule 3-5.2(e), Rules Regulating The Florida Bar. Mr. Barley also availed himself of this opportunity to be heard and filed such a motion.

Constitutional Analysis - Due Process

The due process clause of the fourteenth amendment of the United States Constitution requires notice and an opportunity to be heard before a person's rights are taken. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313; 70 S.Ct. 652, 656-657; 70 L.Ed. 652, (1950). The suspension or revocation of a license requires constitutional due process. See Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). In Bell, the Court held that a traveling minister's license to drive automobiles could not be suspended without procedural due process. The Court declared: "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood." The requirement of procedural due process does not, however, require a predeprivation hearing. Barry v. Barchi, 443 U.S. 55, 63, 99 S.Ct. 2648, 61 L.Ed.2d 365 (1979). Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633 (1974). See also Stock v. Department of Banking and Finance, 584 so2d 112 (Fla. 5th DCA 1991) (pre-hearing emergency suspension of

securities broker license accused of misappropriating complies with due process). The nature of the notice and the quality of the hearing are determined by the competing interests involved. Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). See also Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976) (discussing factors to be considered when determining what process is due). A hearing need only be provided " 'at a meaningful time and in a meaningful manner" in the context of all the circumstances. Mathews, 424 U.S. at 333, 96 S.Ct. at 902 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). The Mathews case explains that three factors should be considered in determining the nature and timing of a hearing. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335, 96 S.Ct. at 1903. The Mathews balancing test has been applied by courts to uphold informal, non-adversarial hearings where a doctor was suspended from the Medicare reimbursement program, Varandani v. Bowen, 824 F.2d 307, 310-11 (4th Cir.1987), cert. dismissed, 484 U.S. 1052, 108 S.Ct. 1000, 98 L.Ed.2d 968 (1988), and where a bus driver was fired for cause, Rodgers v. Norfolk School Bd., 755 F.2d 59, 62-64

(4th Cir.1985). There is no mechanical formula by which the adequacy of state procedures can be determined. To the contrary, "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). For example, in Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 240, 108 S.Ct. 1780, 1788 to 486 U.S. 230, 241, 108 S.Ct. 1780, 1788, the postponement of the hearing until after suspension of a bank officer was supported by an important interest: prompt suspension of indicted bank officers may be necessary to protect the interests of depositors and to maintain public confidence in our banking institutions. Similarly, when there are valid reasons to believe that an attorney is misappropriating the trust funds of a client, there is a valid, important interest in protecting the interests of that client, other clients, and maintaining public confidence in our legal institutions. In the Matter of Kenney, 399 Mass. 431, 436; 504 N.E.2d 652 (Mass. 1987) (State has "significant interest in protecting the public from attorneys who engage in serious misconduct, particularly when the misconduct involves misuse of client funds or a compromising of the fiduciary relationship. There is also a strong interest in maintaining the integrity of the bar.).

Mr. Barley relies heavily on Barry v. Barchi, supra. Such reliance is misplaced. In Barchi, the U.S. Supreme Court held that a state racing agency can constitutionally summarily suspend a trainer's license based upon a a statutory

presumption of responsibility if a horse under his care tests positive for banned substances. Barchi's trainer license was suspended for 15 days. Although he was entitled to a post suspension hearing, the statute mandated that the suspension would remain in full force until a final determination. The statute did not provide a time limit in which to hold a hearing, and the Board had 30 days after the hearing to render a final order. Unlike the situation in Barchi, Mr. Barley was presented with a petition outlining the allegations and affidavits from witnesses with personal knowledge describing serious violations of the ethical rules. Mr. Barley was given the opportunity to answer those allegations in writing. He was then given the opportunity to file a motion for dissolution; upon the filing of a motion for dissolution he was entitled to a prompt hearing. He filed a motion for dissolution on April 19, 1999 and participated in a hearing on June 4, 1999, some 46 days later, which is admittedly longer than the 7 days outlined by Rule 3-5.2(e). Part of that delay is attributable to Mr. Barley's unavailability for a previously scheduled hearing on May 28, 1999, part of the delay is attributable to the unavailability of a referee in the Third Circuit. But that delay does not render the process invalid or unconstitutional. Under Rule 3-7.11(a), the time intervals required under the Rules Regulating The Florida Bar are directory and not jurisdictional. As stated above, there is no set amount of time required for due process, it varies with the circumstances. Matthews, supra.

Unlike Barchi and other cases cited by Mr. Barley a court, not an administrative agency is rendering the decision to temporarily suspend his license, based upon sworn affidavits and a written, sworn response from the respondent. Mr. Barley had the opportunity to respond to the allegations of the petition and did so. The Court ordered a response from the Bar and Mr. Barley also filed a supplemental response which included his verified response to the allegations. The statements and response provided by Mr. Barley were his "opportunity to be heard" and supported the ultimate determination that Mr. Barley had taken trust funds without authorization. This opportunity to respond *before* the emergency suspension was ordered complies with due process and is no different than the procedure approved of by the Supreme Court in Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633 (1974).

Mr. Barley had the additional right to be heard in a motion for dissolution of the emergency suspension, heard by a referee, unlike Barchi who had to remain suspended until the final determination. Mr. Barley then had the additional opportunity of notice and an opportunity to be heard by the filing of a formal complaint, a full hearing before a referee, and a review by this Supreme Court. Barley's requests for delays and recalcitrance created much of the delay in this case. He should not be allowed to drag his feet and then complain that the journey is taking too long. Stock v. Department of Banking and Finance, 584 so2d 112 (Fla. 5th DCA 1991) ("Stock cannot request a hearing in a manner that would suggest routine

handling and then complain for the first time on appeal that she was not given an early hearing.") In none of the due process cases cited by Respondent was there any mention of delay attributable to the respondent. Moreover, delay is not *per se* unconstitutional. "If the delay is reasonable, when balanced against the harm to the individual of a prolonged delay, such a delay despite the harm could be constitutional." Gershenfeld v. Justices of the Supreme Court of Pennsylvania, 641 F.2d 1419 (E.D.Pa. 1986).

Great Public Harm

The history of the rule shows that misappropriation is synonymous with great public harm. The language contained in Subsection (a) of Rule 3-5.2 had its genesis from Integration Rule 11.10(5). See In the Matter of the Florida Bar, 262 So.2d 857 (Fla. 1972). Initially the rule stated that an attorney could be suspended upon affidavits showing that an attorney "appears to be causing great public harm by misappropriating funds to his own use, or otherwise." Id. at 874. The Integration Rule was later modified and re-codified into the modern rules. The Florida Bar re: Rules Regulating the Florida Bar, 494 So.2d 977 (Fla. 1986). At that time the emergency suspension procedures were incorporated into Rule 3-5.1(g) and contained the same language equating the misappropriation of funds to great public harm. Id. at 1001. In 1991, this Court removed the rule from Rule 3-5.1 and created the current Rule 3-5.2. The Florida Bar re Amendments to the Rules Regulating The Florida

Bar 1-5.1(g); 3-5.2; 14-1.1 and Chapter 15, 593 So.2d 1035 (Fla. 1991). In doing so, the "misappropriating funds to his own use, or otherwise" language was dropped from the rule. Id. at 1038. In its opinion the Court stated "Many of the other changes reflected in the appendix are technical. Several, however, are substantive and are necessary, we believe, to make this rule meet the requirement of due process." Id. at 1036. The removal of the misappropriation language was not one of the items later discussed in the opinion, leading to the conclusion that the removal was one of the "technical" changes being made, not one of the substantive changes. Therefore, it seems that misappropriation is encompassed within "great public harm," although it also can encompass other serious misconduct.

Case law supports the interpretation that misappropriation of client funds is synonymous with great public harm. In The Florida Bar v. Graham, 605 So.2d 53 (Fla. 1992), this Court upheld a temporary suspension based on allegations of theft of client funds, lack of trust account records and misrepresentations to The Florida Bar. The petition for emergency suspension was granted in that case on June 5, 1990. The Respondent moved for a dissolution which was referred to a referee for factual findings. On November 13, 1990, six months later, the referee recommended that Graham be reinstated upon conditions. The Bar sought review of that recommendation. Meanwhile, the Bar proceeded to prosecute its separately filed complaint regarding the same allegations. The case was tried on February 27, 1991,

eight months after the initial emergency suspension. The referee found that the Bar had proven its allegations by clear and convincing evidence and recommended that Graham be disbarred. The Supreme Court accepted the referee's findings and recommendations despite the mitigating evidence of stressful familial and financial problems and lack of prior record. The Court stated: "[W]e cannot excuse a lawyer's misappropriation of a client's funds and misrepresentations to cover up any wrongdoings as a means to solve life's problems. Absent evidence casting doubt on a lawyer's culpability, such as evidence of mental health or substance-abuse problems, a lawyer is held fully responsible for any misconduct." Id. at 56. See also The Florida Bar v. Cobourn, 345 So.2d 334 (Fla. 1977); The Florida Bar v. Baum, 355 So.2d 429 (Fla. 1978); The Florida Bar v. Hunt, 417 So.2d 966 (Fla. 1982) (each respondent was temporarily suspended based on affidavits establishing great public harm by misappropriation of funds).

Other states have similarly temporarily suspended attorneys on a finding of great public harm based on affidavits reflecting misappropriations. The District of Columbia Court of Appeals temporarily suspended an attorney under a rule substantially the same as former Integration Rule 11.10(5), finding that affidavits reflecting misappropriations warranted a finding of great public harm. In re Malvin, 466 A.2d 1220, 1223 (D.C. Cir. 1983). Interestingly, the Court of Appeals cited Hunt as precedent for their decision. In reaching their decision, the court modified the

standards normally applicable to the issuance of preliminary injunctions to professional disciplinary proceedings. The Court laid out four factors: 1) whether the attorney is causing irreparable public harm by misappropriating client funds to his own use, or by other means, 2) whether there is a substantial likelihood, based on all the available evidence, including affidavits, that a significant sanction will be imposed on the attorney at the conclusion of any disciplinary proceedings, 3) whether the balance of injuries, as between attorney and clients, favors a temporary suspension, and 4) whether the public interest would be served by a temporary suspension. That court weighed these factors and entered the order suspending Malvin despite his written responses disputing some of the allegations. In this case, Mr. Barley was misappropriating funds as demonstrated by affidavits of individuals with personal knowledge--his client and an auditor. Such conduct is presumed to warrant disbarment. Mr. Barley's prior instance of misconduct also indicated that the public would best be served by a temporary suspension and tilted the balance in favor of a suspension.

Perhaps Mr. Barley is suggesting that he did not know that misappropriating funds could subject him to being suspended or disbarred. He used that argument successfully in The Florida Bar v. Barley, 541 So.2d 606 (Fla. 1989), when he convinced the referee that he did not realize that failing to advise client to seek independent counsel to enforce provisions of divorce settlement agreement against

deceased, former husband's estate when attorney is also trustee of trust fund for settlement proceeds, charging both hourly fee and contingent fee, withdrawing fees directly from trust fund, thereby causing liquidity problems forcing client to borrow from bank, persuading client to loan money from trust fund and subsequently drafting and backdating notes with terms different from those agreed to so as to evidence loans, were violations of the rules. It is almost inconceivable that an attorney practicing in Florida could not know that taking unauthorized draws from a trust account constitutes a serious offense warranting swift deterrence against continued misconduct. But Mr. Barley is not merely any attorney, but one who has already suffered a suspension for a breach of trust. He, above others, should have realized the problem, and the potential penalties. All attorneys are presumed to know the rules. Rule 3-4.1, Rules Regulating The Florida Bar.

Equal Protection

Mr. Barley claims that he was not afforded equal protection because he is not entitled to the *supersedeas* provisions of Chapter 120 like other licensees. He is comparing apples to oranges. Attorneys are not the same as bartenders, cosmetologists and other licensed individuals. Attorneys are afforded an extraordinary degree of trust by their clients and by the public at large. The question is not whether Mr. Barley was treated the same as other licensed professionals, but

whether he was treated as any other attorney. He was. The Florida Bar Standing Board Policy 15.60 states:

> **Emergency Suspension.** Upon receipt of a complaint alleging misappropriation of trust funds, branch staff counsel shall immediately notify staff counsel and initiate an investigation to determine whether information exists that clearly establishes a misappropriation. If misappropriation is established staff counsel and branch staff counsel will determine if the filing of a petition for emergency suspension is warranted under the facts and, if so, branch staff counsel shall immediately take steps necessary to file the petition.
>
> A petition for emergency petition shall be filed in every case where there is a misappropriation of trust funds, unless there are facts known that clearly establish that the respondent shall not cause great public harm if emergency action is not taken. The decision not to file such a petition shall be by the concurrence of the designated reviewer, staff counsel, and bar counsel, and thereafter shall be approved by the board of governors. Such a decision, and the reasons therefor, shall be reduced to writing and made a part of the file.
>
> Any dispute over the appropriateness of the filing of a petition for emergency suspension shall be resolved in favor of filing the petition, unless the designated reviewer directs that the dispute be referred to the board of governors.

Based on this policy, The Florida Bar files petitions for emergency suspension in almost all cases involving misappropriation by attorneys. The policy does not allow for arbitrary and capricious treatment. Instead, it establishes that all attorneys who misappropriate client funds will be treated the same, unless extraordinary factors warrant otherwise. Mr. Barley was treated no better and no worse than any other attorney in this state.

III THE REFEREE'S FINDINGS ARE SUPPORTED BY COMPETENT EVIDENCE AND ARE PRESUMED CORRECT

In attorney disciplinary proceedings, a referee's findings of fact enjoy a presumption of correctness that will be upheld unless the challenging party can show that the facts are unsupported by the evidence in the record, or are clearly erroneous. The Florida Bar v. Cox, 718 So. 2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983). Moreover, the Court will not re-weigh the evidence and substitute its judgment for that of the referee if there is competent substantial evidence to support the referee's findings. The Florida Bar v. MacMillan, 600 So. 2d 457, 459 (Fla. 1992), as cited in The Florida Bar v. Lecznar, 690 So. 2d 1284, 1287 (Fla. 1997). Further, "[t]he party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings, or that the record evidence clearly contradicts the conclusions."The Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996). Similarly, Rule 3-7.7(c)(5), Rules Regulating The Florida Bar, states: *"Burden*. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful, or unjustified." Therefore, Mr. Barley, as the party seeking review, has the burden of overcoming the referee's presumption of correctness by showing that his decision is contrary to law or not founded upon any evidence. Mr. Barley has failed to meet

that burden. The testimony of Mr. Emo, his client, James Wells, the bar auditor, Mr. Barley's own testimony, and the exhibits introduced into evidence provide competent substantial evidence for all the facts and violations found by the referee.

The Bar concedes, however, that venue was appropriately in Leon County, and therefore, the costs assessed against Mr. Barley for travel out of Leon County should be reduced accordingly.

IV THE RECOMMENDED DISCIPLINE DOES NOT COMPORT WITH PRIOR DECISIONS OF THIS COURT.

While the referee's fact findings are presumptively correct and should not be overturned unless clearly erroneous or lacking evidentiary support, The Florida Bar v. Vining, 707 So.2d 670, 672 (Fla. 1998), the referee's recommended discipline is afforded a broader scope of review. This Court has stated, however, that a recommended discipline will not be second-guessed "so long as that discipline has a reasonable basis in existing case law." Vining at 673 (quoting The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997)). The Florida Bar intends to show that the recommended discipline in this case is not supported by existing case law.

This Court has repeatedly stated that "misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate remedy."The Florida Bar v. Shanzer, 572 So.2d 1382, 1383 (Fla. 1991). "In the overwhelming number of recent cases, we have disbarred attorneys for misappropriation of funds notwithstanding the mitigating evidence presented." Shanzer, supra (and cases cited therein). In the more recent cases of The Florida Bar v. Travis, 765 So.2d 689 (Fla. 2000), and The Florida Bar v. Korones, 752 So.2d 586 (Fla. 2000), this court disbarred attorneys for misappropriation of trust funds despite evidence of numerous mitigating factors such as those found by the referee in this case. Both of those attorneys could also claim a lack of prior discipline, unlike Mr.

Barley who has a prior discipline for improper trust account and fee practices. Although the presumption of disbarment can be overcome, it is usually based upon evidence that indicates mental or substance abuse problems that mitigate the lawyer's level of culpability. The Florida Bar v. Graham, 605 So.2d 53 (Fla. 1992), Korones, supra. No such factor is present here. As this Court stated in Travis:

> In cases involving isolated incidents of misappropriation, this Court has found the presumption of disbarment rebutted when mitigation such as cooperation, restitution, and the absence of a past disciplinary record exist. See Florida Bar v. Thomas, 698 So.2d 530 (Fla.1997). Although these factors are necessary, they do not, in and of themselves, serve to overcome the presumption of disbarment.

Travis at 691. No one involved in this case could state that Mr. Barley has been cooperative in this investigation.

Neither the referee, nor Mr. Barley, have cited any case that would support the recommended discipline under the facts of this case. Although some mitigation was established, such mitigation was insufficient to overcome the presumption of disbarment for misuse of client funds. Accordingly, this Court should disbar Mr. Barley.

CONCLUSION

Mr. Barley was provided with all the process he was due, and more. He was given an opportunity to respond to the petition for emergency suspension before it was granted. He was permitted to file a motion for dissolution of that order. He was granted two hearings in which he could testify, cross-examine witnesses, and submit evidence. He was entitled to seek review in this Court. Despite his protestations, the evidence, including his own testimony, clearly establishes that he misappropriated client funds, designated for a particular purpose, to his own use. He has failed to show that any of his rights were violated or that the referee's findings are unsupported by the record.

The discipline recommended by the referee, however, is not supported by the case law and should be disapproved. Mr. Barley, like the overwhelming number of similarly situated attorneys, should be disbarred for his misappropriation of client funds.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. SC00-579, TFB File No. 99-00,433 (02) has been mailed by certified mail # 7000 1670 0013 3103 3018, return receipt requested, to JOHN A. BARLEY, Respondent, at his record Bar address of 400 N. Meridian Street, Post Office Box 10166, Tallahassee, Florida 32302-2166, and by certified mail # 7000-3400 0000-5633-598, to his alternate address of 4927 Heathe Drive, Tallahassee, Florida 32308 on this _____ day of December 2001.

_____
EDWARD ITURRALDE, Bar Counsel

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

Undersigned counsel does hereby certify that the Answer Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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Copy to Florida Bar Headquarters

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