IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-579

THE FLORIDA BAR,

Complainant/Cross-Petitioner,

vs.

JOHN A. BARLEY,

Respondent/Petitioner.

RESPONDENT/PETITIONER'S AMENDED INITIAL BRIEF

On Review of a Report of a Referee in a Florida Bar Disciplinary Proceeding

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RULES REGULATING THE FLORIDA BAR

PRELIMINARY STATEMENT

References to Warren A. Emo, ArC/Masterbuilders, Inc., The Florida Bar, Donald M. Spangler James F. Wells, Edward Iturralde, John A. Barley, Robert Augustus Harper, Columbia County Circuit Judge Paul S. Bryan, Columbia County Circuit Judge E. Vernon Douglas, Suwannee County Circuit Judge Thomas J. Kennon, Jr., Taylor County Court Judge Stephen Murphy, Taylor County Circuit Court Judge James Roy Bean, Leon County Circuit Court Judge Nikki Ann Clark, and Lafayette County Court Judge Harlow H. Land, Jr., are abbreviated as Mr. Emo, ArC, the Bar, Mr. Spangler, Mr. Wells, Mr. Iturralde, Mr. Barley, Mr. Harper, Judge Bryan, Judge Douglas, Judge Kennon, Judge Murphy, Judge Bean, Judge Clark and Judge Land, respectively. References to documents of record included in the Appendix are indicated by (App. Pg.__).

STATEMENT OF THE CASE AND THE FACTS

This disciplinary proceeding was initiated by ArC's Bar complaint against Mr. Barley. (App. 1-74). The complaint was signed by Mr. Emo on 10/26/98, under penalty of perjury, and was filed with the Bar on 10/30/98. The complaint alleged that ArC had delivered a check for $76,760.68 payable to Mr. Barley's law firm's trust account to fund settlement of a dispute, that Mr. Barley used the funds for unauthorized purposes, and that Mr. Barley did not return the funds to ArC when Mr. Emo later asked him to do so.

On 1/13/99, Mr. Barley provided the Bar with trust accounting records maintained by his law firm for the 3-year period from 1/1/96 to 12/31/98. On 3/17/99 Mr. Wells prepared a report stating the findings, conclusions and opinions he had reached in auditing the trust accounting records he had received from Mr. Barley.

On 3/24/99, without prior warning or notice to Mr. Harper or to Mr. Barley, Mr. Spangler filed a Petition For Emergency Suspension seeking emergency suspension of Mr. Barley's license to practice law, attaching a 3/18/99 affidavit by Mr. Emo, a 3/19/99 affidavit by Mr. Wells, and a copy of Mr. Wells' 3/17/99 report. (App. 75-109). Upon the 3/24/99 Petition being filed, the Court designated the proceedings initiated thereby as Case No. 95168. Neither Mr. Wells' 3/17/99 report nor any other results of his audit were provided to Mr. Harper or to Mr. Barley until 3/25/99 when Mr. Barley received a copy of the 3/24/99 Petition.

On 3/26/99 Mr. Harper filed Mr. Barley's Response and Motion to Abate in response to the 3/24/99 Petition, controverting the material allegations of the Petition, showing that the controversy is between ArC and Mr. Barley's law firm, is civil in nature, and turns on disputed issues of fact, and that the Petition did not allege sufficient facts to show that Mr. Barley is causing great public harm. On 3/29/99, Mr. Spangler filed a Motion to Quash Mr. Barley's 3/26/99 Response and Motion.

On 3/30/99 Mr. Barley delivered his verified Response to ArC's Bar complaint to Mr. Spangler. (App. 111-184). The facts established by Mr. Barley's 3/30/99 Response and its

attachments rebutted many of the material facts alleged in the 3/24/99 Petition and its supporting affidavits, and showed that the supporting affidavits were incomplete, incorrect, and misleading in several important respects. (App. 1-74; 75-109; 111-184).

On 3/31/99 the Court entered an order directing the Bar to file a reply to the merits of the 3/26/99 Response to the 3/24/99 Petition. That same day Mr. Spangler filed the Bar's Reply, arguing that the Court should disregard the facts and reasoning advanced by Mr. Barley's 3/26/99 Response and Motion in favor of the contrary facts and reasoning advanced by the 3/24/99 Petition and its supporting affidavits. The Bar's 3/31/99 Reply did not acknowledge Mr. Barley's 3/30/99 Response in answer to ArC's Bar complaint, and did not address any of the facts established by the Response.

On 4/1/99 Mr. Harper filed an Addendum to Response and Motion to Abate, attaching Mr. Barley's 3/30/99 Response in answer to ArC's Bar complaint and excerpts from the record of the Leon County Circuit Court proceedings on ArC's civil complaint to show that Mr. Barley's pleadings in both cases were consistent and created genuine dispute over the ultimate facts that were material to determining whether Mr. Barley's law firm's use of the $76,760.68 it received from ArC on 10/30/97 was authorized.

Without further notice or hearing, the Court proceeded to consider the merits of the 3/24/99 Petition and on 4/9/99 entered an order summarily denying Mr. Barley's 3/26/99 Response and Motion to Abate and the Bar's 3/29/99 Motion to Quash, and granting the

relief sought by the Petition, thereby temporarily suspending Mr. Barley's license to practice law.

On 4/19/99 Mr. Harper filed Mr. Barley's Motion for Dissolution or Amendment supported by Mr. Barley's affidavit of even date. (App. 185-305). Mr. Barley's 4/19/99 Motion and supporting affidavit expanded on the facts alleged in his 3/26/99 Response and Motion in answer to the 3/24/99 Petition and those established by his 3/30/99 Response in answer to ArC's Bar complaint, and showed that Mr. Barley reasonably understood his law firm was authorized to draw from the $76,760.68 to meet its operating expenses and to credit those draws to ArC's account as advances toward payment of the legal services it rendered and the costs it incurred in continuing to represent the interests of ArC and Amwest until all matters in dispute were finally resolved. (App. 1-74; 75-109; 111-184; 185-305).

On 4/23/99 the Chief Justice entered an order referring the 4/19/99 Motion to Judge Bryan, directing him to appoint a referee pursuant to Rule 3-7.6 (a) to hear, conduct, try, and determine the matters presented in the disciplinary action initiated by the 3/24/99 Petition within 7 days from the date of the assignment and thereafter submit a report and recommendation to the Court within 7 days from the date of the assignment. On 4/29/99 Judge Douglas acted for Judge Bryan in appointing Judge Murphy to serve as the Referee. By dated 4/29/99, Judge Bryan asked the Court to extend the 7-day period of time provided for Judge Murphy to conduct a hearing on the 4/19/99 Motion to a time after May 14, 1999.

Without notice or hearing, on 4/30/99 the Court entered an order granting Judge Bryan's request, thereby indefinitely extending the time provided for the 4/19/99 Motion to be heard.

On 5/28/99 Mr. Harper filed an Emergency Motion for Stay of Suspension, or for Clarification to resolve the controversy between the Bar and Mr. Barley over the effect the 4/19/99 Motion had on the 4/9/99 order and the proceedings initiated by the 3/24/99 Petition.

On 6/4/99 Judge Murphy conducted a hearing on the 4/19/99 Motion. At the outset of the hearing, Mr. Harper questioned the procedure governing the hearing, noting that the Bar was obliged to demonstrate a likelihood of prevailing on the merits of the complaint underlying its 3/24/99 Petition, that no such complaint had yet been served, and that Mr. Barley did not yet have notice of the claims that may be asserted in any such complaint. Mr. Spangler then responded that he had already drafted the complaint that but had not filed it because of the pendency of the 4/19/99 Motion, that the complaint mirrored the allegations of the 3/24/99 Petition, and that he would file that complaint when the 4/19/99 Motion was finally disposed of by the Court. Judge Murphy then ruled that Mr. Barley had the initial burden of proof to support the 4/19/99 Motion. Mr. Harper then proceeded to present evidence through Mr. Barley, who then testified concerning every aspect of the claims asserted in ArC's Bar Complaint and in the 3/24/99 Petition. Mr. Barley then presented the files he had maintained in providing legal representation to ArC and Amwest from 7/30/97 to 9/11/98, the billings his law firm issued to ArC accounting for the legal services he rendered and the costs it incurred in providing such rewpresentation, the checks his law firm

received from ArC in payment of the amount billed for such representation it provided from 7/30/97 to 9/11/98, the amount his law firm applied from the draws it made from the $76,760.68 in payment of the amount billed for such representation, the part of such funds his law firm returned to ArC upon such representation being concluded, and the communications and course of dealings he had with Mr. Emo concerning billing and payment for legal services rendered and costs incurred and concerning his law firm's receipt and use of the $76,760.68 and the accounting it provided to confirm such use. (App. 397-533). Mr. Barley's testimony and the documents Mr. Harper introduced in evidence through Mr. Barley substantiated the the facts alleged in his 3/26/99 Response, the facts established by his 3/30/99 Response, and his 4/19/99 affidavit testimony. (App. 397-533). In giving his testimony, Mr. Barley unhesitatingly accounted for his contacts, communications and course of dealing with Mr. Emo in clear and distinct terms. (App. 397-533). Mr. Barley's testimony was precise and explicit, and lacking in confusion. (App. 397-533). In defense against Mr. Barley's 4/19/99 Motion, Mr. Spangler offered only the 6/2/99 deposition testimony of Mr. Emo, the documents attached to ArC's Bar Complaint, the testimony of Mr. Wells authenticating his 3/17/99 report and explaining his opinions expressed therein, and Mr. Wells' 3/17/99 report. (App. 534-565).

On 6/15/99 Judge Murphy filed and served his Report of Referee, *finding and concluding that the Bar had failed to show by clear and convincing evidence that Mr. Barley*

is causing great public harm, and recommending that the 4/19/99 Motion be granted and the 4/9/99 order be dissolved. (App. 591-599).

On 6/17/99 Mr. Spangler filed and served his Response to the Report of Referee and his Response to the 5/28/99 Motion for Stay of Suspension or for Clarification,. On 6/21/99 Mr. Harper filed and served his Reply to Mr. Spangler's Response to the Report of Referee and his Reply to Mr. Spangler's Response to the 5/28/99 Motion.

On 7/1/99 Mr. Spangler filed and served a Petition for Order to Show Cause why Mr. Barley should not be held in contempt of Court for allegedly failing to abide by the terms of the 4/9/99 order and, in particular, allegedly failing to notify Miracle Hill Nursing & Convalescent Center, Inc. (Miracle Hill), that he was temporarily suspended from practicing law within 30 days after the 4/9/99 order was issued and continuing to act as counsel for Miracle Hill as late as 6/28/99. Without notice or hearing, on 7/8/99 the Court issued an order that acknowledged the 7/1/99 Petition, designated the proceedings initiated by the Petition as Case No. 95921, and directed Mr. Barley to show cause why he should not be held in contempt of the 4/9/99 order. On 7/9/99 Mr. Spangler filed and served an Amended Petition for Order to Show Cause, amending the 7/1/99 Petition to allege that Mr. Barley further violated the 4/9/99 order by continuing to act as counsel to Richard E. Corbin and Yellow Jacket Marina, Inc.(Yellow Jacket), as late as 7/30/99. Those allegations were based on a complaint Mr. Corbin filed with the Bar on 3/17/99. On 7/14/99 Mr. Spangler filed and served a Second Amended Petition for Order to Show Cause, further amending the 7/1/99

Petition to allege that Mr. Barley violated the 4/9/99 order by continuing to act as personal representative and attorney for an estate, failing to notify the heirs of the estate of his suspension, encumbering the estate's real property without authorization by the Probate Court and without consent or knowledge of the heirs, failing to account to the heirs for distribution of more than $100,000.00 of the estate's assets, charging the estate excessive fees, and failing to timely conclude administration of the estate. Those allegations were based on a complaint Judith Parker filed with the Bar on 6/30/99. Without notice or hearing, on 7/16/99 the Court issued an order amending its 7/8/99 order and directing Mr. Barley to show cause by 8/5/99 why he should not be held in contempt of the 4/9/99 order and why he should not be further suspended from the practice of law until he could demonstrate that he had complied with the order, plus 15 days. On 8/5/99 Mr. Barley filed and served his Compliance with Order to Show Cause. On 8/13/99 Mr. Spangler filed his Response to Mr. Barley's Compliance with Order to Show Cause.

On 7/14/99 Mr. Spangler procured from the Chair of the Second Judicial Circuit Grievance Committee a Witness Subpoena Duces Tecum Instanter directing Mr. Barley by 9:00 A. M that day to produce a wide range of documents and records. That Subpoena was delivered to Mr. Barley at approximately 11:20 A. M. that day. Mr. Barley did not attempt to comply with the Subpoena because he believed it was legally deficient in several respects and sought to impose unreasonable burdens on him. On 7/15/99 Mr. Spangler filed a Petition for Order to Show Cause why Mr. Barley should not be held in contempt of Court

for failing to immediately comply with the Subpoena. Without notice or hearing, on 7/26/99 the Court issued an order that acknowledged the filing of the 7/15/99 Petition, designated the proceedings initiated by the Petition as Case No. 96029, and directed Mr. Barley to show cause by 8/16/99 why he should not be held in contempt for failure to comply with the Subpoena, why he should not be sanctioned, and why the costs of the proceeding should not be assessed against him. On 7/19/99 Mr. Barley filed and served a Motion to Quash Subpoena, For Protective Order, and For Sanctions, which the Court then designated as Case No. 96097. On 8/3/99 Mr. Spangler filed and served his Response to Mr. Barley's 7/19/99 Motion. On 8/13/99 Mr. Barley filed and served his Response To Order To Show Cause in Case No. 96029. On 8/20/99 Mr. Spangler filed and served a Reply To Respondent's Response To Order To Show Cause in Case No. 96029.

On 9/15/99 Mr. Spangler filed and served a Petition for Order to Show Cause why Mr. Barley should not be held in contempt of Court for failing to abide by the terms of the 4/9/99 order in failing to promptly notify his clients, Charles, Mary and Chekeesha Kidd (the Kidds) that he was temporarily suspended from practicing law and continuing to represent the Kidds after the effective date of the 4/9/99 order. Those allegations were based on a complaint the Kidds filed with the Bar on 8/29/99. On 10/5/99 Mr. Spangler filed and served an Amended Petition to Show Cause amending his 9/15/99 Petition to add a paragraph 7 alleging that Mr. Barley had repeatedly violated the terms of the 4/9/99 order. Without notice or hearing, on 10/13/99 the Court issued an order that acknowledged the 9/15/99 Petition and the 10/5/99

Amended Petition, designated the proceedings initiated by the 9/15/99 Petition as Case No. 96539, and directed Mr. Barley to by 11/2/99 show cause why he should not be held in contempt of the 4/9/99 order and why he should not be disbarred for his repeated acts of disobedience. On 11/2/99 Mr. Barley filed and served Respondent's Motion for Enlargement of Time requesting that the time provided for him to serve his response to the 10/13/99 order be extended to 11/9/99, on which date he filed and served his Response to Order to Show Cause.

On 10/7/99 Mr. Spangler filed and served a Motion To Consolidate Case Nos. 95921, 96029 and 96539 with Case No. 95168. On 10/15/99 the Court issued an order granting that Motion, thereby consolidating those cases for all further proceedings.

On 1/26/00, more than 7 months after Judge Murphy filed his Report of Referee, without notice or hearing, the Court entered an order summarily stating that the Referee's Report is disapproved, that Mr. Barley's temporary suspension is continued, and that Mr. Barley's 5/28/99 Emergency Motion for Stay of Suspension or for Clarification would be disposed of in the future by separate order. On 2/12/00 Mr. Spangler filed a Motion for Clarification of the 1/26/00 order. On 2/15/00 Mr. Barley filed a Response to that Motion. On 3/3/00 the Court entered an order stating that the Bar had 60 days from its 1/26/00 order to file a formal complaint on the claims asserted in the 3/24/99 Petition.

On 3/16/00 Mr. Spangler served a formal complaint and a request for admissions by mail to Mr. Barley. (App. 608-642). The 3/16/00 formal complaint stated the claims that

were asserted in the 3/24/99 Petition, and also asserted new claims; namely, that Mr. Barley had violated Rule 4-1.5 prohibiting illegal, prohibited, and clearly excessive fees, and that he had violated Rule 4-8.4 (c) prohibiting dishonesty, fraud, deceit or misrepresentation. The Complaint did not, however, allege sufficient facts to support those new claims. Mr. Spangler's assertion of those new claims flatly contradicted the representations he made in the 6/4/99 hearing on the 4/19/99 Motion. (App. 395).

Instead of filing the 3/16/00 formal complaint with Judge Murphy, the complaint and the request for admissions were sent to the Clerk of the Court for filing under cover of a letter dated 3/16/00, citing Rule 3-3.2 as authority for filing the formal complaint and requesting that the Court appoint a referee to try the cause. (App. 608). The Court thereafter issued a document entitled ACKNOWLEDGMENT OF NEW CASE dated 3/22/00 which changed the designation of the proceedings initiated by the 3/24/99 Petition from Case No. 95168 to Case No. SC00-579. (App. 643). Instead of then sending the formal complaint to Judge Murphy, the Court then issued an order pursuant to Rule 3-7.6 (a) directing Judge Kennon to within 14 days appoint a referee to hear, conduct, try, and determine the matters presented and to thereafter submit findings of fact and recommendations to the Court. (App. 644-645). On 3/29/00 Judge Douglas, acting for Judge Kennon, issued an order appointing Judge Bean to serve as Referee in the further proceedings necessary to dispose of the claims asserted in the 3/16/00 formal complaint.

On 4/13/00, without first making any attempt to communicate with Mr. Barley to determine whether he had yet responded to the 3/16/00 formal complaint or the request for admissions and, if not, whether he intended to do so, Mr. Spangler filed and served by mail a Motion for Default and a proposed order granting the Motion under cover of a letter of even date to Judge Bean. (App. 662-705). On 4/17/00, without notice or hearing, Judge Bean entered an order granting the Motion, thereby defaulting Mr. Barley for failing to timely serve a response to the 3/16/99 formal complaint. (App. 657-661). Without first making any attempt to communicate with Mr. Barley concerning his availability to attend a hearing, on 4/27/00 Mr. Spangler filed and served by mail a Notice scheduling a one-hour final hearing on the 3/16/00 formal complaint for 3:00 p. m. on 6/12/00 at the Taylor County Courthouse. (App. 662-705). On 5/8/00 Mr. Barley filed his Answer to the formal complaint, his Answer to Request for Admissions, a Motion to Set Aside Default, and a Motion to Abate. (App. 646-656). On 5/12/00 Mr. Spangler filed a Response in opposition to the Motion to Set Aside Default, a Response in opposition to the Motion to Abate, and a Motion to Strike the Answer to the formal complaint and the Answer to the Request for Admissions. (App. 662-705).

On 6/12/00 Judge Bean commenced the scheduled hearing, and first considered all pending motions. Judge Bean then ruled to deny Mr. Spangler's Motion to Strike, to grant Mr. Barley's Motion to Set Aside Default, to accept Mr. Barley's Answer to the formal complaint and Answer to the Request for Admissions, and to grant Mr. Barley's Motion to

Abate, thereby abating further proceedings on the 3/16/20 formal complaint and postponing a final hearing on that complaint until 30 days after conclusion of the jury trial that was scheduled to commence September 15, 2000, in Leon County Circuit Court on ArC's civil complaint. (App. 662-705). On 6/22/00 Judge Bean entered an order confirming his rulings in the foregoing respects and scheduled commencement of a final hearing for 10/20/00 on the 3/16/00 formal complaint.

By letter to the Clerk of the Court dated 6/8/00, again referencing Rule 3-3.2, Mr. Spangler submitted another formal complaint and another request for admissions for filing, and requested appointment of another referee. That same day, Mr. Spangler sent Mr. Barley a copy of the 6/8/99 formal complaint and request for admissions by mail. The 6/8/00 formal complaint perpetuated the claims Mr. Spangler had asserted in paragraphs 7, 8 and 9 of his 7/14/99 Second Amended Petition for Order to Show Cause filed in Case No. 95921, the claims he had asserted in paragraphs 7, 8 and 9 of his 8/13/99 Response to Respondent's Compliance with Order to Show Cause, the claims he had asserted in paragraphs 6 and 7 of his 10/5/99 Amended Petition for Order to Show Cause in Case No. 96539, and additional claims collateral to those claims. All such claims were based on the allegations made in the 3 separate complaints Mr. Corbin, Ms. Parker and the Kidds filed with the Bar after contacting Mr. Spangler concerning proceedings on ArC's Bar complaint. The Court thereafter issued a document entitled "ACKNOWLEDGMENT OF NEW CASE" dated 6/21/00 that designated the proceedings initiated by filing the complaint as Case No. SC00-

1243. On 6/22/00 the Court issued an order, again referencing Rule 3-7.6 (a), and again directing Judge Kennon to within 14 days appoint a referee to hear, conduct, try, and determine the matters presented in the formal complaint and to thereafter submit findings of fact and recommendations to the Court. On 6/30/00 Judge Kennon issued an order appointing Judge Land to serve as Referee in Case No. SC00-1243.

On 7/6/00 Mr. Barley addressed a letter to the Clerk of the Court requesting that certain administrative errors in classifying, docketing and designating the cases referenced above be corrected by, among other things, re-classifying the 3/16/00 formal complaint filed to initiate Case No. SC00-579 as a continuation of Case No. 95168, acknowledging that the 6/8/00 formal complaint embodied the claims asserted in the cases that were initiated by the Petitions to Show Cause referenced above, re-classifying the 6/8/00 formal complaint filed to initiate Case No. SC00-1243 as a pleading supplemental to the 3/16/00 formal complaint, and assigning both formal complaints to one referee. That same day, Mr. Barley filed and served his Answer to the 6/8/00 formal complaint.

On 8/14/00 ArC filed a notice of voluntary dismissal without prejudice in Leon County Circuit Court to dismiss its civil complaint and avoid the jury trial that was scheduled to begin on 9/15/00. (App. 711-712).

By letter dated 8/21/00 the Clerk of the Court answered Mr. Barley's 7/6/00 letter requesting correction of administrative errors related to classifying, docketing and designating the Bar proceedings referenced above, advising that he has a non-discretionary

duty to treat the complaints filed by the Bar as new cases, and suggesting that Mr. Barley file an appropriate motion with the Court if he wanted to request the relief sought by his 7/6/00 letter. On 8/30/00 Mr. Barley filed and served a Motion to Correct Administrative Errors that attached the 7/6/00 and 8/21/00 letters.

Without notice or hearing, on 8/24/00, more than 14 months after Mr. Harper filed Mr. Barley's 5/28/99 Emergency Motion, the Court issued an opinion disposing of that Motion, denying stay of the temporary suspension imposed by the 4/9/99 order, clarifying the stay provisions of Rule 3-5.2, and addressing the disposition to be made of Case Nos. 95921, 96029, 96097 and 96539. On 9/8/00 Mr. Barley filed a Motion for Rehearing of the 8/24/00 opinion. Pursuant to the 8/24/00 Opinion, on even date, the Court issued an order, again referencing Rule 3-7.6 (a), and again directing Judge Kennon to within 14 days appoint a referee to hear, conduct, try, and determine the matters presented in Case Nos. 95921 and 96539, and to thereafter submit findings of fact and recommendations to the Court. On 9/5/00 Judge Kennon issued an order appointing Judge Murphy to serve as Referee in Case Nos. 95921 and 96539.

By letter to the Clerk of the Court dated 7/20/00 Mr. Spangler asked the Court to extend the 90-day period of time provided by Rule 3-5.2 (f) for the report of the referee on a formal complaint to be filed with the Court. By letter dated 8/4/00 Mr. Barley responded to that letter by objecting to the request to extend that 90-day period of time. On 9/20/00 Mr. Barley filed a Second Motion to Dissolve that attached a copy of Mr. Spangler's 7/20/00

letter and Mr. Barley's 8/4/00 letter, asking the Court to enter an order confirming that the temporary suspension imposed by the 4/9/99 order was automatically dissolved by operation of law pursuant to Rule 3-5.2 (f).

On 10/20/00, overruling the Mr. Barley's objections, Judge Bean commenced a final hearing at 9:00 A. M. on the issues of liability raised by the 3/16/00 formal complaint. (App. 750). Mr. Spangler began presenting the Bar's case-in-chief by asking Mr. Emo whether he agreed with the testimony given by Mr. Barley in his 4/19/99 affidavit. (App. 752). When Mr. Spangler concluded his direct examination of Mr. Emo, Mr. Barley began cross-examining Mr. Emo. Because the time available for hearing on 10/20/00 expired before Mr. Barley's cross-examination of Mr. Emo was concluded, Judge Bean continued the final hearing to 8:30 A. M. on 11/3/00. (App. 934). At approximately 10:30 A. M. on 11/3/00 while Mr. Barley was cross-examining Mr. Emo, Judge Bean asked Mr. Barley if he was close to concluding his cross-examination of Mr. Emo and Mr. Barley then said he had quite a bit more to do before finishing. (App. 984). Judge Bean then asked Mr. Barley to estimate how much time he thought he would need to finish and Mr. Barley said he thought he would need the rest of the morning. (App. 984). Judge Bean then said that was longer than Mr. Barley had estimated when they concluded the hearing on 10/20/00 and the only time available to conclude the final hearing was the remainder of that day. (App. 984). After Mr. Emo's testimony was concluded, Mr. Spangler continued presenting his case in chief through Mr. Wells. (App. 1039-1096). At approximately 3:30 P. M. on 11/3/00 Mr. Spangler

finished presenting his case-in-chief. (App. 1099). Judge Bean then informed Mr. Barley that he would have no more time to present his case-in-chief than the remainder of the day. (App. 109-1101). Because of the small amount of time remaining, Mr. Barley was unable present the testimony of any witness other than himself and was unable to testify to the extent necessary to identify each of the papers in the files his law firm maintained related to the legal representation his law firm had provided to ArC and Amwest from 7/30/97 to 9/11/98 that he believed was required to prove the extent that Mr. Emo had lied in making the allegations of ArC's Bar complaint, in giving his 6/2/99 deposition, and in testifying at final hearing. (App. 1101-1170). In an effort to compensate for the disadvantage he was experiencing from lack of adequate time to effectively present such evidence, Mr. Barley then adopted the testimony he had given in his 4/19/99 affidavit and in the 6/4/99 hearing, and identified and tendered the files in bulk that he had marked for identification for introduction in evidence. (App. 1101-1170; 1174-2472). Judge Bean then admitted those files in evidence for post-hearing review and consideration. (App. 1101-1170). Mr. Barley also then tendered a copy of ArC's Bar complaint and a copy of his 4/19/99 affidavit in support of his 4/19/99 Motion. (App. 1101-1170). Mr. Barley then referenced the record of proceedings on his 4/19/99 Motion and asked Judge Bean to review the transcript of Mr. Emo's 6/2/99 deposition testimony and to consider Mr. Barley's testimony at the 6/4/99 hearing as supplemental to the brief testimony he was limited to giving in the 11/3/00 final hearing. (App. 1101-1170). Judge Bean then admitted in evidence a copy of ArC's Bar

complaint, a copy of Mr. Barley's 4/19/99 affidavit, and a copy of the transcript of the 6/2/99 deposition testimony given by Mr. Emo. (App. 1101-1170).

At 9:00 A. M. on 11/21/00 Judge Bean resumed the final hearing by announcing that he had considered all the evidence presented and the closing arguments of counsel, and said he had concluded that Mr. Barley was guilty of the Rules violations charged in the 3/16/99 formal complaint. (App. 2473-2475). Judge Bean then announced his intention to proceed with presentation of evidence related to discipline. (App. 2475). Mr. Barley then made an oral motion to reconsider the written request he had earlier made to continue the final hearing to the first available date in January 2001. (App. 2475-2494). After further consideration, Judge Bean granted that motion and rescheduled continuation of the final hearing to 1/10/01. (App. 2488-2489). When Judge Bean concluded the 11/21/00 hearing, Mr. Barley left the hearing room. Judge Bean and Mr. Spangler then engaged in an *ex parte* conversation related to preparation of an order finding Mr. Barley guilty of violating the Rules, pursuant to which Mr. Spangler prepared a proposed Order As To Guilt and delivered the same to Judge Bean by letter dated 11/22/00. (App. 2506-2516). After delivering his 11/22/00 letter and proposed order to Judge Bean, Mr. Spangler and Judge Bean engaged in further *ex parte* communications related to Mr. Spangler's 11/22/00 proposed order. By letter dated 12/14/00, Mr. Spangler delivered to Judge Bean a Report of Referee As To Guilt that conformed to the changes Mr. Spangler understood Judge Bean wanted to be made to the

11/22/00 proposed order. On 12/18/00 Judge Bean signed the Report of Referee As To Guilt that accompanied the 12/14/00 letter from Mr. Spangler. (App. 2517-2526).

At 9:00 A. M. on 1/10/01 Judge Bean continued the final hearing. (App. 2527-2530). Mr. Barley was then presented evidence in mitigation of the Rules violations cited in the 12/18/00 Report through the testimony of eleven witnesses, Father Michael Foley, Lee A. Everhart, Barbara Morton, Kyle Redfearn, John E. Thrasher, Barry Scott Richard, Robert A. Harper, Ted L. Biddy, Beth Lacivita, Jim Boylan and Mr. Barley. (App. 2530-2686). The final hearing was then concluded.

By letter dated 1/12/01, Mr. Spangler delivered to Judge Bean a proposed Report of Referee and an Affidavit of Costs. (App. 2695-2710). By letter dated 1/17/01, Mr. Barley delivered to Judge Bean a Motion to Reconsider Report of Referee as to Guilt. Without notice or hearing, on 1/25/01 Judge Bean entered an order denying Mr. Barley's 1/17/01 Motion to Reconsider. That same day, Judge Bean signed a Report of Referee dated 1/25/01 stating his findings of fact and recommendations as to guilt, discipline and taxation of costs. (App. 2711-2724). On 2/5/01 Mr. Barley delivered a Motion for New Trial and for Rehearing to Judge Bean. (App. 2725-2732). Without notice or hearing, on 2/8/01 Judge Bean entered an order denying Mr. Barley's 2/5/01 Motion for New Trial and for Rehearing. (App. 2733-2734).

Without notice or hearing, on 2/20/01 the Court entered an order summarily denying Mr. Barley' 8/30/00 Motion to Correct Administrative Errors, his 9/8/00 Motion for Rehearing, and his 9/20/00 Second Motion to Dissolve.

On 2/22/01 Mr. Barley filed and served his Petition for Review of Report of Referee. On 2/26/01 Mr. Ituralde filed and served a Cross-Petition for Review.

SUMMARY OF ARGUMENTS IN SUPPORTOF PETITION FOR REVIEW

Rule 3-5.2 is unconstitutional on its face and as applied in that it denies affected attorneys due process and equal protection of the law for employing vague and indefinite language that is susceptible to more than one reasonable interpretation and fails to adequately notify affected attorneys of the conduct that is prohibited by the Rule, fails to provide any objective standards or criteria to determine whether attorney conduct is causing great public harm, fails to provide any opportunity for affected attorneys to be heard before an emergency suspension is imposed, fails to provide any opportunity for affected attorneys to request and obtain a stay of an emergency suspension, and fails to provide a prompt post-suspension proceeding that affords affected attorneys reasonable opportunity to be meaningfully heard at a meaningful time and provides for a prompt final determination of all matters in dispute.

The Court did not correctly apply the clear and convincing standard of proof in considering and acting on the 3/24/99 Petition and its supporting affidavits, and did not adhere to the due process and equal protection of law provisions of the Rule in applying it to this case.

Judge Bean did not correctly apply the clear and convincing standard of proof to the evidence adduced at final hearing, denied Mr. Barley opportunity to be fully and fairly heard, made findings of fact that are not supported by clear and convincing evidence of record, made recommendations of guilt and discipline that are not supported by clear and convincing evidence of record or by well-reasoned application of the Rules, and recommended taxation of costs that are not supported by competent evidence of record and are not properly taxable against Mr. Barley.

I. Rule 3-5.2 Is Unconstitutional On Its Face And As Applied For Vagueness, Denial Of Due Process, And Denial of Equal Protection Of Law.

A. Controlling Law-- The court's adoption and enforcement of the Rules Regulating The Florida Bar are authorized as an exercise of police power conferred by the Tenth Amendment to the United States Constitution. *Florida Jurisprudence, 2d Ed., Constitutional Law, Section 202; McInerney v. Ervin*, 46 So. 2d 458, 462 (Fla. 1950); *Petition of Florida State Bar Association*, 40 So 2d 902, 906 (Fla. 1949). In exercising police power, the means employed must have a reasonable and substantial relationship to the object intended to be

achieved by their use, and not be unreasonable, arbitrary or capricious in their application and effect on anyone subjected thereto. *Nebbia v. New York*, 291 U. S. 502, 525, 54 S. Ct. 505, 510, 78 L. Ed. 940 (1934); *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9, 15 (Fla. 1974). The exercise of police power cannot extend beyond reasonable interferences with the liberty of individuals actions that are necessary to protect the public health, safety and welfare. *Newman v. Carson,* 280 So. 2d 426, 428 (Fla. 1973); *Conner v. Sullivan*, 160 So. 2d 120, 122 (Fla. 1963); *Larson v. Lesser*, 106 So 2d 188, 191-192 (Fla. 1958); *Eelbeck Milling Co. v. Mayo*, 86 So. 2d 438, 439 (Fla. 1956).

A rule or statute that imposes a penalty for commission of a prohibited act is void for vagueness if its terms are so vague that people of common intelligence must necessarily guess at its meaning and reasonably differ as to its application. *Connelly v. General Constr. Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926); *State v. Wershow*, 343 So. 2d 605, 607-608 (Fla. 1977). A rule or statute that fails to give adequate notice of the conduct it prohibits and invites arbitrary and discriminatory enforcement is void for vagueness in violation of due process and equal protection of law. *Kolender v. Lawson*, 461 U. S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983); *Southeastern Fisheries Assoc. v. Department of Natural Resources*, 453 So. 2d 1351,1353-1354 (1984).

Due process is a course of legal proceedings that hears before it condemns, proceeds upon inquiry, and renders judgment only after studied consideration of the facts and law advanced by adversarial parties. *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990).

Equal protection of law means each person is entitled to stand before the law on equal terms with, to enjoy the same rights and privileges as belong to, and to bear the same burdens as are imposed on others who are similarly situated. *Eskind v City of Vero Beach*, 159 So. 2d 209, 212 (19633); *North Bay Village v. Blackwell*, 88 So. 2d 524, 526 (Fla. 1956); *Drexel v. City of Miami Beach*, 64 So. 2d 317, 319 (Fla.1953); *ABC Liquors, Inc. v. Ocala*, 366 So. 2d 146 (Fla. 1st DCA 1979), cert. den. 376 So. 2d 69 (Fla. 1979).

B. Rule 3-5.2 Void for Vagueness-- As indicated by Judge Murphy on page 7 of his 6/15/99 Report of Referee, neither Rule 3-5.2 nor case law defines "*great public harm*" or provides any standards or criteria to guide an objective determination of whether such conduct is occurring. Moreover, the modifying phrase "*appears to be causing*" which precedes "*great public harm*" is unavoidably subjective when used in any context.[1] Without a clear definition of "*great public harm*," the Rule does not provide the Bar or its members with sufficient information to have a common understanding of what constitutes attorney conduct that causes "*great public harm*." Without any standards or criteria to guide the making of an objective determination of the kind of attorney conduct causes "*great public harm*" neither the Bar nor its members are provided with the means necessary to objectively make such a determination and are left to speculate at what "*great public harm*" means in applying the Rule, and, most assuredly, will reasonably differ in the results of their

[1] Such a phrase invites only the perspective of the person or persons who are looking and does not require adherence to any standards or criteria to assure that the only acceptable perspective is a reasonably comprehensive and objective picture of everything material that is available for consideration to truthfully determine the reality of the entire situation under scrutiny.

speculation.[2] As written, therefore, the Rule is impermissibly vague and subjects those to whom it applies to denial of due process and equal protection of law. *See Connelly v. General Constr. Co., supra; State v. Wershow, supra; Kolender v. Lawson, supra; Southeastern Fisheries Assoc. v. Department of Natural Resources, supra*.

C.--On its Face Rule 3-5.2 Denies Due Process and Equal Protection of Law-When considering adoption of the Bar's proposed rule, the Court recognized some of the due process deficiencies presented and modified the proposed rule in an effort to cure those deficiencies [3]

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[2] If in adopting the Rule the Court had eschewed use of the phrase "causing great public harm" in favor of the more commonly used phrase "constitutes a danger to the public health, safety or welfare," had specified the prohibited attorney conduct that may constitute a danger to those public interests, and had demonstrated a reasonable and substantial relationship between imposing an emergency suspension on an attorney engaging in such prohibited conduct and protection of such public interests, it is unlikely an attorney could legitimately complain that he did not know he was engaging in prohibited conduct that could result in emergency suspension of his license to practice law.

[3] "…affidavits should not become a basis for depriving attorneys of their livelihoods if in fact these affidavits are ***meritless***. Thus, we have heightened the standard by which such affidavits will be reviewed in this Court upon a motion to dissolve an emergency order. Under this new standard, the affidavit or affidavits ***must allege facts*** that, ***if true***, would demonstrate ***clearly and convincingly*** that an attorney ***appears to be causing great public harm***….Many … changes …are technical. ***Several, however, are substantive and are necessary, we believe to make this rule meet the requirement of due process***….We have modified some of the procedures reflected in The Bar proposal because we believe it failed to address some of the possible procedural problems that might arise in cases of this type….The Bar rule, for example, appears to presume that an attorney always will move to dissolve the emergency order….***The Bar proposal at best is ambiguous as to what further procedures apply in such instances***….The Bar proposal does not appear to differentiate between those instances in which a motion for dissolution is filed before a referee is appointed and those in which the motion is filed after a referee is appointed. This oversight could create confusion…." (emphasis added) *The Florida Bar re Amendments to the Rules Regulating The Florida Bar, supra at 1036*.

Despite the Court's apparent efforts to overcome such deficiencies, the Rule it ultimately adopted remains confusing and constitutionally infirm. Although the opinion espouses the policy of denying a petition for emergency suspension based on "*meritless*" affidavits and only affidavits that state "*true facts"* will be sufficient, neither the opinion nor the Rule give any clue as to how the Court will determine whether a supporting affidavit is "*meritless*" before it acts on the petition or indicate how the Court will determine whether the a supporting affidavit states "*true facts*." The Rule does not use the words "*meritless*" or "*true facts*" in reference to supporting affidavits. Instead, the Rule plainly states that the Court may issue an order suspending an attorney on an emergency basis when the affidavits filed in support of the petition demonstrate facts that, if "*unrebutted*," would establish clearly and convincingly that the attorney appears to be causing great public harm. Although the Rule suggests the Court will review supporting affidavits before deciding how to act on the petition, the Court's opinion expressly states that *it will not review such affidavits until considering a motion for dissolution of an order granting the petition*. Whether an affidavit is "*unrebutted*," whether it is "*meritless*," and whether it states "*true facts*" are very different inquiries.[4]

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[4] An affidavit is a statement in writing given under an oath administered by a duly authorized person, *Youngker v. State*, 215 So2d 318 (4th DCA Fla.). An affidavit ***is ordinarily inadmissible in evidence*** and ***merely serves to proffer the testimony a person may offer as evidence at trial***, and ***do not***, therefore, ***demonstrate the truth of any fact alleged***. *Food Fair Stores, Inc. v. Trussel*, 131 So 2d 730, 732 (Fla. 1961). (emphasis added) If the statements made in an affidavit are not admissible as evidence ***they may not be considered to establish the ultimate facts that are material to determining the issues in dispute***. (emphasis added) *Tarkoff v. Schmunk,* 117 So. 2d 442, 444 (Fla. 2nd DCA 1959). The court ***must disregard inadmissible statements, whether in the form of perceived facts, opinions or legal conclusions, and may***

It is a relatively easy chore for a court to determine whether an affidavit is "*unrebutted*." That chore is accomplished by comparative analysis, as is routinely done when a court is called upon to rule on a motion for summary judgment that relies on statements of material fact made in a supporting affidavit and an opposing affidavit is filed. If the opposing affidavit genuinely disputes a material fact, the supporting affidavit is "*rebutted*." If no opposing affidavit is filed or one is filed but does not geninely dispute any material fact, the supporting affidavit is "*unrebutted*." The task of determining whether an affidavit is "*meritless*" or whether an affidavit states "*true facts*" is, however, another matter. Such tasks cannot properly be accomplished without the trier of fact hearing the testimony of the affiant(s) through direct and cross-examination. Only when the affidavits filed in support of a petition for emergency suspension are *unrebutted* and *competently proffer sufficient admissible evidence to demonstrate clearly and convincingly that an attorney is causing great public harm*, may the Court grant a petition for emergency suspension and impose emergency conditions of probation on the attorney or suspend the attorney on an emergency basis.

The Rule employs the clear and convincing standard of proof to determine the legal sufficiency of affidavits the Bar files in support of a petition for emergency suspension. That

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consider only the part of an affidavit that would be admissible as evidence if testified to at trial. (emphasis added) *Humphrys v Jarrell*, 104 So2d 404, 409 (2nd DCA 1958).

evidentiary standard is well-known to the Court, *In re Davey*, 645 So. 2d 398, (Fla. 1994), and imposes a heavy burden on the Bar; to wit:

> "This level of proof 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."

Id at 404. Implicit in the foregoing definition is the requirement that *the credibility and weight of the evidence presented be judged by the trier of fact.*

To apply the clear and convincing standard of proof in a Rule 3-5.2 emergency suspension proceeding, the Court must judge the credibility and weight of the statements proffered by the affidavits in order to assess their truth and merit *without seeing and hearing witnesses and without affording the affected attorney the opportunity to cross-examine his accusers and offer proofs*. Such a process *requires the Court to engage in speculation* and results in *an ex parte preliminary determination of facts.*

In a case where the affidavits filed in support of the petition are rebutted before the Court acts on the petition, the Rule provides no indication of the procedure the Court will follow in determining whether the supporting affidavits meet the clear and convincing standard of proof. In the absence of such procedure, or objective standards or criteria governing such procedure, the Rule provides no safeguards against arbitrary and

discriminatory decision-making and undue delay in determining whether sufficient "*true facts*" exist to merit the Court concluding that such facts *clearly and convincingly demonstrate that an attorney is causing great public harm.*

In summary judgment proceedings, the moving party has the burden of establishing the truth of all material facts and showing conclusively that the issues of material fact are not subject to genuine dispute, all inferences of fact arising from the proofs proffered by affidavit are drawn against the moving party and in favor of the party opposing the motion, and all doubts regarding the existence of any disputed issue of material fact are resolved against the movant. *Holl v. Talcott*, 191 So. 2d 40, 47-48 (Fla. 1966). *To safeguard the due process rights of affected attorneys, similar standards should be provided to govern the process of deciding whether to grant or deny a petition for emergency suspension* under Rule 3-5.2.

In adopting the Rule, the Court likened an emergency suspension to a temporary injunction and cited the case of *Department of Business Regulation v. Provende, Inc.,* 399 So. 2d 1038 (Fla. 3rd DCA 1981), to illustrate the due process requirements applicable to issuance of a temporary injunction under Fla. R. Civ. P. 1.610.[5] The Court has long-adhered to the policy that *a temporary injunction is intended to preserve the status quo pending determination of the merits of a case*, *Smith v. Housing Authority of Daytona Beach*, 148 Fla.

[5] The well-established test consistently applied by Florida courts to determine whether the moving party has made a showing adequate to satisfy the prerequisites for obtaining temporary injunctive relief are: (a) the moving party has a likelihood of suffering irreparable harm and is without an adequate remedy at law, () the moving party has a substantial likelihood of prevailing on the merits, (c) the threatened injury to the moving party outweighs any possible harm to the non-moving party; and (d)) the granting of a temporary injunction will not disserve the public interest. *Id* at 1041.

195, 3 So2d 880 (Fla. 1941), *should not be granted when where there is substantial dispute as to legal rights involved and the complainant's right to the relief he seeks is doubtful or is contested by answer and proofs*, *Dade Enterprises, Inc. v. Wometco Theaters*, 119 Fla. 70, 160 So 209 (Fla. 1935), *and will not be granted against acts already committed in absence of pleading and proof of reasonably well-grounded probability that the same course of conduct will continue in the future*, *City of Jacksonville v. Wilson*, 157 Fla. 838, 27 So2d 108 (Fla. 1946). If in adopting Rule 3-5.2 the Court had provided for notice and hearing in accord with the provisions of Fla. R. Civ. P. 1.610 *and had conditioned the availability of an emergency suspension order on satisfying the prerequisites required for issuance of a temporary injunction*, the Rule on its face would have provided for adequately safeguarding the due process rights of affected attorneys.

In *Provende*, the Third District held that due process does not ever require an agency to give a licensee notice and opportunity to be heard before issuing an emergency order suspending his license, citing *Barry v. Barchi*, 443 U. S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979). For the following reasons, it appears the Third District misunderstood and misapplied the holdings of that case.

Barry v.Barchi involved a challenge to the constitutionality of a New York statute authorizing the State Racing Board to summarily impose a 15-day suspension of a harness racing trainers' license when a post-race test of a horse trained by a licensee revealed the presence of prohibited drugs. *Barry v. Barchi, supra* at 2645-2646. On review, the United

States Supreme Court concluded that *the statute was unconstitutional on its face and as applied for violating the Due Process Clause because it did not assure an affected trainer of a prompt post-suspension hearing and a prompt final determination of the issues in dispute*.[6] Thus, contrary to the observation of the Third District in *Provende*, the correct answer to the question of whether the state may issue an order imposing an emergency suspension of a person's license to engage in a business or profession without a pre-suspension hearing *is not a "no" in all cases*. Instead, the correct answer to that question in any case turns on whether the particular statute or rule authorizing emergency suspension of a license without a pre-suspension hearing provides: (1) *an objective procedure for determining whether the state has presented sufficient proof before an emergency suspension order may issue*; and (2) *reasonable opportunity for an affected licensee to avoid irreparable harm resulting from imposition of an emergency suspension of his license by assuring him a prompt hearing on the merits of the state's claims and his defenses and a prompt final determination of all issues in dispute*. *Barry v. Barchi, supra* at 2649. In the absence of such

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[6] "…we have held that the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U. S. 545, 552, 85 S. Ct. 1187, 1192, 14 L. Ed. 2d 62 (1965). Here, the provision for an administrative hearing, ***neither on its face or as applied in this case***, assured a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the State. Indeed, insofar as the statutory requirements are concerned, ***it is as likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the state to its proof until they have suffered the full penalty imposed.*** Yet, it is possible that Barchi's horse may not have been drugged and Barchi may not have been at fault at all. Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, it seems to us. We discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse racing." (emphasis added)

provisions, *a statute or rule that authorizes emergency suspension of a person's business or occupational license without affording the licensee a hearing on the merits of the state agency's claims and the his defenses before the emergency suspension is imposed unlawfully denies affected licensees due process of law*. See *Board of Regents v. Roth*, 408 U.S. 564, 570-571, 92 S. Ct. 2701, 2705-2706, 33 L. Ed. 2d 548 (1972); *Bell v. Burson*, 402 U. S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90 (1971); *Armstrong v. Manzo*, supra; *Joint Anti-Fascist Comm. v. McGrath*, 341 U. S. 123, 168, 71 S. Ct. 624, 646, 95 L. Ed. 817 (1951). In his specially concurring opinion, Justice Brennan aptly elucidated that point.[7]

Rule 3-5.2 affords affected attorneys *no right whatsoever to be heard in response to the petition for emergency suspension before an emergency suspension is imposed, and provides only a conditional right to immediately challenge an emergency suspension order*; namely, by filing a motion for dissolution or amendment that states good cause for the relief sought. Only when such a motion is filed, referred to a referee, and set for hearing is the affected attorney afforded any opportunity to be heard. Although the Rule provides for a referee's report and recommendation to be submitted to the Court within a certain period of

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[7] "Where, as here, ***even a short temporary suspension threatened to inflict substantial and irreparable harm, an 'initial' deprivation quickly becomes 'final,' and the procedures afforded either before or immediately after suspension are de facto the final procedure***. A final full hearing and determination after Barchi had been barred from racing his horses and had lost his clients to other trainers was aptly described by the District Court as an 'exercise in futility,' and would certainly not qualify as a 'meaningful opportunity to be heard at a meaningful time.' ***To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by suspension can still be avoided—i. e., either before or immediately after suspension***." (emphasis added) *Barry v. Barchi, supra* at 2654.

time, the Rule *does not commit the Court to acting on the report and recommendation within any precise period of time after it is filed, does not limit how long the Court may take to issue an order stating the disposition it has made of the referee's report and recommendation, and does not require the Court to disclose the facts, law and reasoning it relies upon in reaching its decision.*[8]

The Rule requires the referee to recommend dissolution or amendment of the emergency suspension order to the extent Bar counsel fails to demonstrate a likelihood of prevailing on the merits of *any element* of the underlying complaint, but *fails to require the Bar to file any "underlying complaint" in support of its petition for emergency suspension before a hearing is conducted on a motion for dissolution*. In fact, the Rule makes it clear that there is *no urgency* at all for the Bar to file any such complaint in providing that the Bar need only file such a formal complaint within 60 days of the emergency suspension order and proceed to trial on the underlying issues, whatever they may be, in providing that the running of that 60 day period is stayed by the filing of a motion for dissolution and that the stay shall persist until the Court *"continues"* the emergency suspension order, and in failing to limit the time the Court may take to act on the referee's report and recommendation on the motion. Without requiring a petition for emergency suspension to state all the Bar's claims

[8] The Rule specifies that such a motion "…shall immediately be assigned to a referee by the Chief Justice." The Rule further specifies that the referee shall conduct a hearing on the motion in 7 days or less from the date the motion is assigned, that the referee shall submit a report and recommendation on the motion to the Court in 7 days or less from the date the hearing is concluded, that upon receipt of the referee 's report and recommendation the Court shall review and act thereon, and that all proceedings on the referee's report and recommendation are expedited in the Court.

against the affected attorney and to plead all the ultimate facts that support those claims or requiring the Bar to simultaneously file a formal complaint satisfying those pleading requirements, the affected attorney *is not afforded adequate notice* of the Bar's grievances against him *and is not afforded reasonable opportunity to be timely heard and present the available evidence that would prove the truth of his conduct, the circumstances under which it occurred, and the consequences of such conduct to others.*

Because the Rule allows the Bar 60 days after issuance of an emergency suspension order to file a formal complaint (the underlying complaint), in most contested cases the affected attorney is likely to file a motion for dissolution before the Bar files any formal complaint. Until the motion for dissolution is finally disposed of, and the Rule does not expressly provide how that is accomplished, the Bar is permitted to delay filing a formal complaint. While the Rule does not indicate when and how a motion for dissolution will be finally disposed of, it does provide that if the Court "*continues*" an emergency suspension in any manner, the stay of proceedings caused by the filing of the motion for dissolution is dissolved and the Bar is required to file a formal complaint within 60 days of the continuance.

The Rule neither specifies the circumstances under which the Court may *"continue"* an emergency suspension nor the procedure by which the occurrence of such is accomplished. It seems the provision for continuance of an emergency suspension presumes the suspension has previously been interrupted and is *"continued"* only when ordered by the

Court. The Rule makes no express provision for interrupting an emergency suspension but implies such will occur when an affected attorney prevails on a motion for dissolution. In that event, it appears there would be no need to then or thereafter *"continue"* the emergency suspension because even if the Bar subsequently filed a formal complaint and prevailed on the merits of the complaint, any resulting suspension of the attorney would not be a continuation of an earlier temporary suspension but would be a final suspension for a specified period of time. Therefore, the purpose for providing that the Court may *"continue"* an emergency suspension is not readily understandable within the context of the Rule. Nor does the Court's opinion adopting the Rule provide any insight to acquiring such understanding. *The Florida Bar re Amendments to the Rules Regulating The Florida Bar, supra* at 1037.

In failing to provide any means by which an affected attorney can immediately apply for and obtain a stay of an emergency suspension order on a showing of good cause and relegating his only opportunity to obtain relief from such an order to filing and prosecuting a motion for dissolution to a successful conclusion or to prevailing on the merits of any formal complaint the Bar may ultimately file, the Court has adopted a Rule that effectively assures an emergency suspension order will stay in effect long enough to cause the attorney to suffer irreparable and substantial harm.

Because the Rule does not provide an objective procedure for determining whether the Bar has presented sufficient proof to demonstrate that an affected attorney appears to be

causing great public harm (whatever that is), does not limit the duration of an emergency suspension, does not provide for an affected attorney to apply for and obtain a stay of an emergency suspension pending final determination of the issues in dispute absent a showing by the Bar that a stay would constitute a probable danger to the public health, safety or welfare, does not provide for the affected attorney to otherwise avoid the irreparable and substantial harm that results from imposition of an emergency suspension, and does not assure the affected attorney a prompt post-suspension hearing and a prompt final determination of all issues in dispute, it fails to pass the test enunciated by the Supreme Court in *Armstrong v. Manzo, supra*, and is unconstitutional on its face for denying affected attorneys due process of law. *Barry v. Barchi, supra*.

D. As Applied, Rule 3-5.2 Denied Mr. Barley Due process and Equal Protection of Law -- Although the Court directed the Bar to reply to the merits of Mr. Barley's 3/26/99 Response in answer to the 3/24/99 Petition, the Court did not seriously question the allegations of the 3/24/99 Petition or critically analyze its supporting affidavits, and considered the Bar's 3/31/99 Reply sufficient to overcome the questions raised by Mr. Barley's 3/26/99 Response before issuing its 4/9/99 order granting the Petition. Nor was the Court's consideration of the Petition and its supporting affidavits affected by the sworn and well-documented factual account to the contrary provided by Mr. Barley's 3/30/99 Response in answer to ArC's Bar complaint.[9] After Mr. Barley's 3/30/99 Response was filed on

[9] Mr. Barley's 3/30/99 Response addressed and responded to each of the allegations of ArC's Bar complaint by providing an account of the contacts, communications and course of dealings

4/1/99, the Court did not order the Bar to file a reply addressing the additional facts alleged in the Response and did not otherwise indicate that it was aware of or considered the effect of those facts in deciding to issue its 4/9/99 order.

Instead of proceeding with deliberate caution to determine whether the facts alleged in the affidavits the Bar filed in support of the 3/24/99 Petition provided sufficient competent and credible evidence to clearly and convincingly demonstrate that Mr. Barley's complained of conduct appeared to be causing great public harm, the Court either overlooked or ignored numerous inconsistencies between the facts alleged in the Petition and its supporting affidavits and the facts alleged in Mr. Barley's 3/26/99 Response and Motion and established by his 3/30/99 Response in summarily determining that issue adverse to Mr. Barley. No hearing was conducted to take testimony, receive documents in evidence, and consider argument of law to resolve such inconsistencies. The 4/9/99 order did not describe any conduct Mr. Barley had demonstrated that appeared to be causing great public harm, did not describe any public harm his conduct appeared to be causing, did not state any findings of fact or conclusions of law to support a reasoned judgment that Mr. Barley appeared to be causing great public harm, nor otherwise provide any insight into the analysis or reasoning the Court applied in deciding to grant the relief sought by the Petition.

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between Mr. Barley and Mr. Emo that were incorrectly or incompletely accounted for or not mentioned by Mr. Emo in ArC's Bar complaint or in Mr. Emo's 3/18/99 affidavit, and were material to determining whether Mr. Barley had good reason to understand on and after 11/5/97 that his law firm was authorized to draw from the $76,760.68 it received and deposited in trust to ArC's account on 10/30/97 to pay its operating expenses and to credit those draws to ArC's account as advances for payment of the amount billed for legal services and costs incurred in continuing to represent the interests of ArC and Amwest.

Critical review of the 3/24/99 Petition and its supporting affidavits, correct application of the clear and convincing standard of proof to those supporting affidavits, and fair consideration of the facts alleged in Mr. Barley's 3/26/99 Response and Motion in answer to the Petition and those established by in his 3/30/99 Response in answer to ArC's Bar complaint in the light most favorable to Mr. Barley should have led the Court to conclude that the Petition was legally insufficient to sustain entry of an order of emergency suspension. Instead, however, on Friday, 4/9/99, the Court inexplicably decided to grant the Petition and temporarily suspend Mr. Barley's license to practice law in Florida on an emergency basis. On Monday, 4/19/99, Mr. Harper filed Mr. Barley's motion for dissolution or amendment, 10 days after the 4/9/99 order was issued, 4 of which were week-end days.

Instead of immediately assigning Mr. Barley's 4/19/99 Motion to a referee on the Monday it was filed or the next day, the Court took no action on the Motion for 4 more days when the Chief Justice issued his 4/23/99 order directing Judge Bryan to appoint a referee to hear the Motion and to submit a report and recommendation to the Court. The 4/23/99 order was issued pursuant to Rule 3-7.6 (a) but should have been entered pursuant to Rule 3-5.2 (e) (1). That order was in derogation of the express requirements of Rule 3-5.2 (e) (1) in that the Chief Justice thereby delegated to a subordinate Judge his power to directly appoint a referee to hear and report on the Motion. That delegation of authority resulted in unnecessary delay in appointing a referee, in conducting and concluding a hearing on the Motion, and in submittal of the referee's report and recommendation on the Motion.

Additionally, that delegation of authority resulted in a referee being appointed without regard to his capability to efficiently conduct and conclude an appropriate hearing on the Motion, to fairly consider and properly decide the issues, and to properly develop and timely submit a report and recommendation to the Court that effectively addressed and disposed of all issues in dispute. Had the Chief Justice immediately made a direct appointment of the referee, selection of a judge to serve as referee could have sooner been made and the selection could have better been made with due regard to the judge's prior experience in considering and deciding issues like those raised by the 3/24/99 Petition and the 4/19/99 Motion to maximize the probability of proper development and timely submittal of a report and recommendation that effectively addressed and disposed of all issues in dispute.

A judge was not appointed to serve as referee until 4/29/99 when Judge Douglas, acting for Judge Bryan, issued an order appointing Judge Murphy. That same day, Judge Bryan sent a letter to the Chief Justice advising that Judge Murphy could not conduct a hearing on the 4/19/99 Motion *until 5/14/99* and inexplicably asked that the 7-day period of time provided by the 4/23/99 order for conducting a hearing on the Motion be extended to a time *after 5/14/99*. Without notice or hearing, on 4/30/99 the Acting Clerk of the Court issued an order granting that request, thereby extending that period of time to an indefinite date beyond 5/14/99. By failing to directly appoint a judge to serve as referee immediately after the 4/19/99 Motion was filed, indulging Judge Bryan in delaying making the appointment until 4/29/99, and summarily granting Judge Bryan's request to extend the 7-

day maximum period of time provided for conducting a hearing on the motion to an indefinite date in the future, the Chief Justice acted in derogation of the express requirements of Rule 3-5.2 (e) (2), authorized indefinite delay in conducting a hearing on the Motion, and unnecessarily delayed final disposition of the Motion.

Instead of promptly considering Mr. Barley's 5/28/99 Emergency Motion, the Court took no action on the Motion for more than 2 weeks when it entered its 6/15/99 order directing the Bar to file a response by 6/21/99. Despite the 5/28/99 Emergency Motion, its supporting documentation and Mr. Barley's 6/21/99 Reply to the Bar's 6/17 99 Response graphically illustrating the grave consequences Mr. Barley was experiencing from the emergency suspension continuing in effect, the Court allowed Judge Murphy's 6/15/99 Report recommending dissolution to languish for more than 7 months before issuing its 1/26/00 order summarily disapproving the Report and took no further action on the 5/28/99 Emergency Motion for more than 14 months when it issued its 8/24/99 opinion denying the Motion. In its 8/24/00 opinion, the Court acknowledged that Mr. Barley's 5/28/99 Emergency Motion had raised legitimate doubts over the operation and effect of the stay provisions of the Rule, and that clarification of such provisions by published opinion was appropriate, but proceeded to provide such clarification in a way that clearly said the Court really thought clarification was unnecessary; i. e., the questions concerning the stay provisions of the Rule raised by Mr. Barley's 5/28/99 Emergency Motion are answered by a plain reading of the unambiguous provisions of the Rule. When preparing the 8/24/00

opinion the Court decided to consider Mr. Spangler's several petitions for orders to show cause why Mr. Barley should not be held in contempt for violating the 4/9/99 order and Mr. Barley's responses to those petitions. In addressing those matters, the opinion showed that the Court improperly engaged in judging the credibility and weight of the differing representations of fact Mr. Spangler had made in those petitions and that Mr. Barley had made in response to those petitions.

Judge Murphy's 6/15/99 Report concluded that the Bar had failed to show by clear and convincing proof that Mr. Barley appears to be causing great public harm by his actions in this case due to uninterrupted continuation of the attorney/client relationship that existed between Mr. Barley and Mr. Emo from December 1997 when Mr. Emo said he first had knowledge of Mr. Barley's law firm's use of the $76,760.68 to September 1998 when the relationship ended upon implementation of a settlement that resolved all matters for which Mr. Barley was providing representation. In reaching that conclusion, Judge Murphy properly applied the clear and convincing standard of proof in judging the credibility and weight of the evidence adduced at the 6/4/99 hearing on Mr. Barley's 4/19/99 Motion. In disapproving the Report, the Court, at a minimum, substituted its judgment on the credibility and weight of the evidence for that of the trier of fact. A fair reading of the transcript of Mr. Emo's 6/2/99 deposition testimony in contrast to the testimony given by Mr. Barley in the 6/4/99 hearing should have led the Court to realize that Mr. Emo's testimony did not meet the test for clear and convincing evidence that Mr. Barley's law firm was not authorized to

use the $76,760.68 to the extent it did, whereas Mr. Barley's testimony appears to have overwhelmingly met that test.

Instead of treating Mr. Spangler's several petitions for orders to show cause why Mr. Barley should not be held in contempt for violating the 4/9/99 order as derivative of, collateral to, and an inseparable part of the case initiated by the 3/24/99 Petition, the Court treated each petition as initiating a separate case, thereby unnecessarily proliferating the proceedings required to bring this disciplinary proceeding to a proper and final conclusion. Although the Court later consolidated all of those separate cases with the case initiated by the 3/24/99 Petition, it disregarded the effect of consolidation by subsequently treating the formal complaint that followed the Petition as a new pleading initiating a new case, by allowing the bar to file a separate formal complaint to prosecute the claims it had asserted in the petitions to show cause, and by treating that complaint as a new pleading initiating a new case, thereby effectively undoing its earlier consolidation of all cases and unnecessarily multiplying the proceedings required to conclude this disciplinary proceeding.

The Court further compounded its proliferation of proceedings by directing Judge Kennon to appoint a referee to try the claims asserted in the formal complaint that followed the 3/24/99 Petition without first relieving Judge Murphy of his assignment to hear such claims, and by thereafter directing Judge Kennon to appoint two more referees to try the claims asserted in the cases that had been initiated by the petitions for orders to show cause, thereby unnecessarily duplicating judicial labor, extending the time required to schedule and

conduct the proceedings to finally hear all matters in dispute, and encumbering Mr. Barley with the undue burden and expense of addressing three referees in three different proceedings instead of one. Moreover, by unnecessarily allowing Judge Kennon to replace Judge Murphy with Judge Bean, the Court assured that the referee hearing the 3/16/00 formal complaint would be without any knowledge or assessment of the testimony and arguments presented in the 6/4/99 hearing. The harm resulting from that change became vividly clear when Judge Bean ruled that the record of proceedings on Mr. Barley's 4/19/99 Motion was not part of the record of proceedings on the 3/16/00 formal complaint, and then refused to allow Mr. Barley any more than the approximate two hours that remained in the day on 11/3/00 to present his case-in-chief. Judge Bean thereby effectively denied Mr. Barley reasonable opportunity to testify to the extent necessary to be fully and fairly heard. When Judge Bean thereafter engaged in *ex parte* communications with Mr. Spangler concerning preparation of the 12/18/00 Report of Referee, he further intruded on Mr. Barley's right to be fully and fairly heard.[10]

In summarily denying Mr. Barley's 8/30/00 Motion to Correct Administrative Errors and his 9/20/00 Second Motion to Dissolve, the Court compounded its departure from the procedural rights expressly provided by Rule 3-5.2 and showed no appreciation for the harm its application of the Rule was unnecessarily visiting on Mr. Barley.

[10] See Rose V. State, 601 So. 2d 1181, 1182-1183 (Fla. 1992)

The Court's application of Rule 3-5.2 did not conform to the procedural and substantive requirements of the Rule, was unreasonable, arbitrary and capricious, and utterly failed to afford Mr. Barley any semblance of due process. Thus, in applying the Rule to this case, the Court unjustifiably denied Mr. Barley his constitutional rights to due process and equal protection of law and caused him to suffer irreparable and substantial harm. *Barry v. Barchi, supra; Board of Regents v. Roth, supra; Bell v. Burson, supra; Armstrong v. Manzo, supra; Joint Anti-Fascist Comm. v. McGrath, supra; Nebbia v. New York, supra; Skull v. State, supra; Lasky v. State Farm Insurance Co., supra; Newman v. Carson, supra; Conner v. Sullivan, supra; Larson v. Lesser, supra; Eelbeck Milling Co. v. Mayo, supra.*

E. On its Face Rule 3-5.2 Denies Equal Protection of Law--In *Department of Natural Resources v. Provende, supra* at 1040, the Third District properly referred to s. 120.68, F. S., the statutory expression of public policy on the right of a licensee to immediately apply for and obtain a *supersedeas* staying enforcement of any agency decision that has the effect of suspending or revoking his license, unless the court, upon petition of the agency, determines that *supersedeas* would constitute a probable danger to the public health, safety or welfare. Notably, the statute does not discriminate among licensees. Without apparent reason justifying its absence, Rule 3-5.2 provides no right of *supersedeas* or stay to an attorney whose license to practice law is temporarily suspended by issuance of an emergency suspension order, and fails to otherwise provide reasonable opportunity for an affected attorney to request and obtain relief from such an order in time to avoid the irreparable and

substantial harm that results from its issuance and continued effect. The absence of such a provision unreasonably discriminates between persons holding licenses to practice law in Florida and persons holding licenses authorizing them to engage in business and other professions in Florida. Thus, as written, Rule 3-5.2 is unconstitutional on its face for depriving an affected attorney equal protection of the law that entitles every Florida licensee the right to immediately apply for and obtain a *supersedeas* staying enforcement of an order suspending or revoking his license pending a final hearing on the merits and a final disposition of all issues in dispute. *See Bell v. Burson*, 402 U. S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90 (1971); *Eskind v. City of Vero Beach, supra; North Bay Village v. Blackwell, supra; Drexel v. City of North Miami Beach, supra.*

II.—The Report of Referee Should be Disapproved. The 1/25/99 Report of Referee provides an incomplete and inaccurate summary of the procedural history of the case; includes findings of fact that are not based on clear and convincing competent evidence of record and include conclusions of law that are not adequately supported by findings of fact; includes recommendations of guilt and discipline that are not supported by findings of fact that are based on clear and convincing competent evidence of record and correctly reasoned application of the Rules Regulating The Florida Bar and controlling principles of law; provides an incomplete and inaccurate account of Mr. Barley's personal history and past disciplinary record; provides an incomplete and inaccurate account of the aggravating and

mitigating factors established by the record of competent evidence; and includes costs that are not properly taxable.

A.--The "SUMMARY OF PROCEEDINGS" portion of the 1/25/00 Report begins by addressing the 3/16/00 formal complaint and incorrectly stating that the complaint was filed 3/22/00 instead of 3/16/00. In truth, as accounted for in the STATEMENT OF THE CASE AND FACTS for this brief, this proceeding commenced on 10/30/98 when the Bar received ArC's Bar complaint. In failing to include the history of this proceeding that preceded filing of the 3/16/00 formal complaint, the 1/25/00 Report inexcusably omits any mention or account of the prior proceedings that relate to the Bar and Court actions that are in dispute and are the proper subject of review. In failing to mention the proceedings that preceded filing of the 3/16/00 formal complaint, the SUMMARY creates the false and misleading impression that the 3/16/00 formal complaint initiated this disciplinary proceeding, when, according to the express provisions of Rule 3-5.2 (e) (4) the formal complaint was merely a procedural vehicle required to facilitate prosecution of the claims that were the basis of the 3/24/99 Petition and continuation of the proceeding initiated by the Petition to the point necessary to finally dispose of all issues in dispute. The SUMMARY is further deficient in the following respects:

- Incorrectly characterizes the 6/12/00 hearing as a "motion hearing" when it was first noticed by Mr. Spangler as the "final hearing" on the 3/16/00 formal complaint.

- Omits mention the reasons why Mr. Barley's Motion to Set Aside Default and his Motion for Abatement were granted; namely: consideration of the requirements of due process of law.[11]
- Does not mention that ArC voluntarily dismissed its civil complaint to avoid going to trial on 9/15/00 after unsuccessfully attempting to convince Judge Clark to continue the trial until after the Bar proceeding was concluded.
- Does not mention that Judge Bean denied Mr. Barley the right to complete his cross-examination of Mr. Emo to the extent such testimony was at odds with the allegations he made under penalty of perjury in ArC's Bar complaint and under oath in his 3/18/99 affidavit, and to the extent his final hearing testimony was at odds with the records Mr. Barley maintained in respect of his law firm's representation of ArC and Amwest.

[11]Despite Mr. Spangler's obdurate resistance, the default was vacated and set aside because Judge Bean realized the 3/16/00 formal complaint did not start a new case but simply continued the case initiated by the 3/24/99 Petition and that he had entered the default without affording Mr. Barley adequate notice and reasonable opportunity to be fully and fairly heard. Proceedings on the 3/16/00 formal complaint were abated primarily because Judge Bean was persuaded that due process of law would be better served if the dispositive question of whether Mr. Barley's law firm's draws from the $76,760.68 to meet its operating expenses and crediting such draws to ArC's account as advances toward payment of the legal services it rendered and the costs it incurred in continuing to represent the interests of ArC and Amwest until all matters in dispute were finally resolved was authorized by the understandings and agreements reached through the communications and course of dealings between Mr. Barley and Mr. Emo would be better decided by a jury in the trial on ArC's civil complaint that was then scheduled to commence on 9/15/00.

- Does not mention that Judge Bean ruled that the record of proceedings on Mr. Barley's 4/19/99 Motion were not a part of the record of proceedings on the 3/16/00 formal complaint.
- Does not mention that Mr. Barley was limited to approximately 2 hours to present his case-in-chief in defense of the allegations made by the 3/16/00 formal complaint and the evidence the Bar adduced in support of those allegations.
- Fails to acknowledge that the 1/25/01 Report of Referee effectively revises and replaces the findings, conclusions and recommendations that were expressed in the 12/18/00 Report of Referee as to Guilt.
- Omits from its description of what constitutes "the record in this case" all pleadings, responses thereto, motions, orders thereon, exhibits admitted in evidence, and transcripts of hearings that related to prosecution of the 3/24/99 Petition and the 4/19/99 Motion, and the transcript of all hearings and all motions and orders thereon that related to prosecution of the 3/16/00 formal complaint, and.
- Fails to acknowledge that all proceedings on the 3/16/00 formal complaint were and remain governed primarily by Rule 3-5.2.

B.--As noted above, the standard of proof required to constitute clear and convincing evidence was recognized by the Court in *In Re Davey*, supra. Because Judge Bean either did not know that standard or knew but did not understand how to correctly apply it to the competent evidence of record, or because he did not know how to make all findings

necessary to resolve all issues in dispute, or because he knew how but failed to do so, the "FINDINGS OF FACT" portion of the 1/25/01 Report of Referee is deficient in the following respects:

- There are no findings of fact showing nature and extent of the attorney/client relationship between Mr. Barley and his law firm and Mr. Emo, ArC, and Amwest from the time that relationship began on 7/30/97 to the time it ended on 9/11/98. Those findings are critical to reconciling differences in the testimony given by Mr. Barley and Mr. Emo and correctly determining whether Mr. Barley reasonably understood on and after 11/5/97 that his law firm was authorized to draw from the $76,760.68 to meet its operating expenses and to credit such draws to ArC's account as advances toward payment of the amount billed for the legal services it rendered and the costs it incurred in continuing to represent ArC and Amwest until all matters in dispute were finally resolved, whether Mr. Barley's law firm properly accounted to ArC for its use of such funds, and whether such accounting effectively reconciled the respective accounts of ArC to Mr. Barley's law firm and of Mr. Barley's law firm to ArC.
- Critical consideration of Mr. Emo's 6/2/99 deposition testimony and his testimony in final hearing should have unhesitatingly led Judge Bean to find and conclude that:
    - Mr. Emo had lied in making the allegations expressed in ArC's Bar complaint;

- Mr. Emo had no memory of most of his meetings and telephone conversations with Mr. Barley and his recollection of when those meetings and conversations occurred, and what was said and by whom in the meetings and conversations was selective and unreliable at best;
- Mr. Emo was evasive when asked to account for the inconsistencies between his allegations in ArC's Bar complaint and the account Mr. Barley had given in his 4/19/99 affidavit, by the records of their dealings Mr. Harper referenced in his cross-examination in Mr. Emo's 6/2/99 deposition, and by the records Mr. Barley referenced in his cross-examination of Mr. Emo in final hearing; and
- Mr. Emo's testimony of how he distrusted Mr. Barley from as early as 8/27/97 and how he thought Mr. Barley was costing ArC far more than necessary to resolve the disputes to which it and Amwest were a party is irreconcilable with his failure to disclose those feelings to Mr. Barley, his continuing requests for and reliance on Mr. Barley's advice and counsel, and his continuing indulgence of Mr. Barley's law firm's retention and use of the $76,760.68 until after a settlement was finalized and he received a final statement accounting for use of $55,666.98 of those funds to pay the amount billed for legal services rendered and costs incurred in providing legal representation of ArC and Amwest from 11/15/97 to 9/11/98, and a refund of the $21,093.70 that was not used to pay for such legal representation.

- Mr. Spangler's questioning of Mr. Emo was confined to efforts to rebut the facts attested to in Mr. Barley's 4/19/99 affidavit, and did not require Mr. Emo to produce any document related to his dealings with Mr. Barley over the approximate 14 months they worked together, except the documents selectively attached to ArC's Bar complaint. Despite the fact that Mr. Emo repeatedly said he did not remember Mr. Barley telephoning him or having a telephone conversation on a given day specified in Mr. Barley's 4/19/99 affidavit, and that he would have to look at his telephone records to see if any such telephone conversation occurred, Mr. Emo did not produce or refer to any of his telephone records. Mr. Spangler nonetheless persisted in asking Mr. Emo whether the account of such telephone conversations provided by Mr. Barley's 4/19/99 affidavit were true and Mr. Emo frequently responded by denying the truth of those accounts if they were at odds with the allegations he had made in ArC's Bar complaint. The extent to which Mr. Emo's testimony is suspect and incredulous cannot be thoroughly appreciated without making a studied review of the transcript of his 6/2/99 deposition and his testimony at the 10/20/00 and 11/3/00 final hearings in contrast with the allegations made in ArC's Bar complaint, the statements made in his 3/18/99 affidavit, and comparing such with the testimony Mr. Barley gave in his 4/19/99 affidavit, at the 6/4/99 hearing on his 4/19/99 Motion, and at the 11/3/00 and 1/10/01 final hearings. Upon completing such a review, the Court should unhesitatingly conclude that the Bar

failed to adduce clear and convincing evidence to sustain the allegations of the 3/16/00 formal complaint.

- Contrary to the findings stated in paragraph 1, there is *no competent evidence of record* to support a finding that Mr. Emo deposited anything in Mr. Barley's trust account or that when the purpose for which ArC issued its 10/30/97 check for $76,780.68 payable to Mr. Barley's law firm's trust account was rendered moot that same day the "character or nature of those funds" did not change.
- The evidence of record is not sufficiently clear and convincing to support the findings stated in paragraph 2 that "Mr. Emo consistently demanded, in written form, the return of the funds, and never authorized their use as an advance toward unearned attorneys fees". First, there is *no competent evidence of record that Mr. Emo ever "demanded, in written form" return of the funds*. The only competent evidence of any written communication from Mr. Emo to Mr. Barley concerning the $76,760.68 after 10/31/97 is Mr. Emo's letter to Mr. Barley dated 1/26/98, his 2/27/98 fax message, his 3/3/98 letter, his 9/9/98 letter, and his 9/14/98 letter. None of those letters *"demand" return of the funds*. Mr. Emo's testimony concerning his telephone communications with Mr. Barley was anything but clear. He acknowledged more than once that he did not remember every occasion that he talked to Mr. Barley on the telephone or everything that was said.

- In his 6/2/99 deposition in answer to Mr. Spangler's direct and leading examination concerning Mr. Barley's affidavit testimony, Mr. Emo first said he could not remember talking to Mr. Barley on the telephone on 12/29/97, 12/30/97 or 12/31/97, or what may have been said in any such telephone conversation. Later in the deposition, however, at Mr. Spangler's invitation, Mr. Emo denied Mr. Barley's account of what was said and the understanding reached in their 12/31/97 telephone conversation because he realized that if he did not deny that account, his testimony would conflict with the allegations he made in ArC's Bar complaint.
- Taken as a whole, the record of Mr. Emo's written communications and his testimony about his telephonic communications with Mr. Barley on and after 10/30/97 concerning the $76,760.68 *are not consistent* with his testimony that he had lost confidence and distrusted Mr. Barley by the time he received hand-delivery of Mr. Barley's 8/27/97 letter requesting that the accompanying statement be paid as soon as possible, *but are consistent* with his actions of continuing to *unhesitatingly accommodate* every request Mr. Barley made for prompt payment and for cash advances to meet his law firm's operating expenses *without question or objection to Mr. Barley*.
- The only evidence of record that supports the finding that Mr. Emo never authorized use of the $76,760.68 as an advance toward unearned attorney's fees was his after-the-fact 3/3/98 letter to Mr. Barley and his self-serving declarations denying Mr.

Barley's accounts of the telephone conversations he initiated with Mr. Emo concerning the funds. The evidence of record is not disputed that during the approximate 6 months that followed their 3/4/98 telephone conversation, Mr. Emo and Mr. Barley had frequent communications with each other and that none of those communications addressed Mr. Barley's law firm's retention and use of the $76,760.68 until 9/3/98 when Mr. Barley addressed that subject in his telephone call to Mr. Emo in discussing final billing. When considered in light of the consistent and precise accounts Mr. Barley gave of his telephone conversations with Mr. Emo concerning his law firm's use of the funds, his course of dealing with Mr. Emo concerning advances to cover operating expenses, billings and payments for legal services, the untimely and inconsistent pattern of Mr. Emo's written communications to Mr. Barley concerning his law firm's use of the funds, and Mr. Emo's inability to clearly recall the occasions on which he and Mr. Barley talked and what they said concerning Mr. Barley's law firm's retention and use of the $76,760.68, it is apparent the finding that Mr. Emo never authorized Mr. Barley's law firm to use the funds as an advance toward unearned attorney fees is not supported by clear and convincing evidence of record.

- The findings concerning the absence of documentation to substantiate the telephone conversations that occurred between Mr. Barley and Mr. Emo are at odds with the evidence of record for reason that many of the fax messages and letters exchanged

between Mr. Barley and Mr. Emo expressly referenced and confirmed that they had communicated by telephone and some measure of what they had said and understood in their telephone communications. The finding that Mr. Barley did not produce any "memo to file" argues a perception of what that phrase means to Mr. Spangler in contrast with the perception Mr. Barley described when he testified in the 11/3/00 final hearing, and wrongly implies that Mr. Barley neglected a duty in failing to produce such documents. Not only was Mr. Barley never requested to produce such documents, his testimony accounting for his telephone conversations with Mr. Emo was clear, unequivocal and precise, provided a rational basis for concluding that he reasonably understood that his law firm was authorized to draw from the $76,760.68 to meet its operating expenses and credit the draws to ArC's account as advances toward payment of the amount billed for legal services rendered and costs incurred in continuing to represent the interests of ArC and Amwest until all matters in dispute were finally resolved, and demonstrated no need for corroboration by reference to such documents. Although Mr. Emo's testimony contradicted much of those accounts, his testimony was not based on any consistently clear recollection of when he talked to Mr. Barley or what was said. Under such circumstances, it was Mr. Emo, not Mr. Barley, who should be criticized for not producing and referring to his "telephone records" to substantiate his testimony in disagreement with Mr.

Barley's account of when their telephone conversations occurred and what was said and understood in those conversations.

- The finding that Mr. Barley testified at final hearing that in his 10/30/97 telephone conversation he told Mr. Emo there was no point in allowing the $76,760.68 to stay in his law firm's trust account does not agree with the characterization of Mr. Barley's earlier testimony given by the question Mr. Spangler asked when cross-examining Mr. Barley in the 11/3/00 final hearing; to wit:

  > "Your testimony was that on October 30th or 31st you had a conversation with Mr. Emo after it became apparent that the settlement funds were no longer going to be needed, and you told Mr. Emo that we deposited the check. There's no point in it sitting here unless you want it to." (App. 1163-1164)

Nor do the conclusions that such testimony "contradicts" Mr. Barley's affidavit testimony and that Mr. Barley's affidavit testimony is consistent with the testimony given by Mr. Emo that Mr. Barley "…virtually insisted that the $76,760.68 remain in the trust account to insure that Mr. Lamb … would no longer abstain from prosecuting his third party complaint and would join forces with ArC's opponents" find support in such affidavit testimony; to wit:

> "Mr. Emo … then asked if it was necessary for the $76,760.68 … to remain with the Barley firm. I then told Mr. Emo that *it was not necessary for those*

funds to remain with the Barley firm, but that Mr. Schwartz, Mr. Sivyer, Mr. Lamb, Mr. Schmuck and Mr. Law had been told that those funds had been deposited with the Barley law firm to settle on the terms and conditions proposed …, that if those funds were returned to ArC the other parties may think ArC was not seriously committed to settling the Florida Mining lawsuit, and that the interests of ArC and Amwest *may be better served if those funds remained with the Barley law firm to secure its continued representation of ArC and Amwest.* Mr. Emo then said he agreed with that reasoning and we began talking about the further negotiations he wanted me to pursue with Mr. Law." (emphasis added) (App. 220-221).

- There is no evidence of record to support the finding that Mr. Barley manipulated Mr. Emo into allowing the $76,760.68 to remain in his custody. Such a finding is in reality a legal conclusion that is not adequately supported by findings of fact based on evidence of record. The only evidence of record that would support the findings of fact necessary to support a legal conclusion that one party manipulated the other is Mr. Emo's incredulous testimony that from 8/27/97 to 9/11/98 while allowing Mr. Barley to continue representing the interests of ArC and Amwest, he deceived Mr. Barley into believing he trusted him, had confidence in Mr. Barley's advice and counsel, appreciated the legal representation Mr. Barley was providing, did not

question Mr. Barley's law firm's billings, had no objection to Mr. Barley's requests for prompt payment of the amount billed and for advances to cover his law firm's operating expenses, and was willing to indulge Mr. Barley's law firm's retention and use of the $76,760.68 it received from ArC on 10/30/97 to meet its operating expenses and to credit its draws from those funds to ArC's account toward payment of the amount billed for the legal services it rendered and the costs it incurred in continuing to represent the interests of ArC and Amwest until all matters in dispute were finally resolved. In reasonable reliance of Mr. Emo's now apparent deceptions, Mr. Barley continued to work with Mr. Emo on the honest belief that all was well with their attorney/client relationship, only to be sued and subjected to Bar disciplinary action after Mr. Emo got the legal representation he wanted from Mr. Barley, all in an apparent effort to avoid having to pay anything for such representation. That is certainly no way for a client to treat its attorney.

- The conclusion stated in the last sentence of paragraph 14 is not adequately supported by findings of fact based on the record of evidence and is at odds with the evidence provided by the 9/22/98 statement issued by Mr. Barley's law firm, showing that the aggregate amount it billed for legal services rendered and costs incurred in continuing to represent the interests of ArC and Amwest from 11/15/97 to 9/11/98 that had not otherwise been paid was $55,666.98, and with the evidence provided by the 10/2/98 letter from Mr. Barley to Mr. Emo transmitting his law

firm's check for $21,103.70 to refund the part of the $76,760.68, plus $10.00, that was not expended to pay for such legal services and costs.

C.--There is no finding of fact or conclusion of law to support a recommendation of guilt for violation of Rule 4-1.5 (Illegal, Prohibited, or Clearly Excessive Fees) or Rule 4-8.4 (c) (Conduct involving dishonesty, fraud, deceit, or misrepresentation). Neither is their evidence of record to base the findings of fact required to support such a recommendation. The 7/31/97 letter from Mr. Barley to Mr. Emo authorized the billing of attorneys fees at the rate of $225.00 per hour. The statements issued by Mr. Barley's law firm to ArC consistently billed at that rate. ArC never questioned or objected to those statements. The attorney fees Mr. Barley's law firm billed ArC in those statements was found to be reasonable and necessary by the only attorney who gave opinion testimony on that issue at final hearing, and that opinion testimony was admitted in evidence without objection from the Bar. Nor did the Bar offer any evidence that questioned the legality or permissibility of Mr. Barley's law firm billing ArC for those fees, or that questioned the reasonableness and necessity of those fees. The $21,093.70 Mr. Barley's law firm drew from the $76,760.68 in excess of the amount billed for legal services rendered and costs incurred was not drawn for attorneys fees but only to meet its operating expenses, and that amount, plus $10.00, was voluntarily refunded to ArC on 10/2/98 before Mr. Emo or ArC filed any complaint against Mr. Barley or his law firm.

D.--Mr. Barley's testimony concerning his dealings with Mr. Emo, ArC and Amwest was forthright, candid, and truthful. His testimony concerning his prior discipline was also forthright, candid, and truthful. Mr. Spangler's quarrel with Mr. Barley's characterization of his prior discipline is purely the result of differences in perception, not the result of applying any objective test. At the 1/10/01 final hearing, Mr. Barley made express reference to the part of the Court's opinion imposing his prior discipline to substantiate his earlier representation to the referee that such discipline was found to primarily be the result of Mr. Barley's ignorance of the Rules and not from any intentional misconduct. Mr. Barley also then testified that the complainant who initiated the prior discipline was not his client, but the disgruntled attorney who represented his client's ex-husband in their dissolution of marriage proceedings until that attorney and his law firm were disqualified on Mr. Barley's motion from continuing to act as counsel of record for the ex-husband in those proceedings. Mr. Barley also then testified that his client who was involved in his prior discipline retained former Justice Adkins to represent her in filing a motion to appear *amicus curiae* when the referee's report and recommendation in that case were pending before the Court, and therein represented that Mr. Barley "…gave her excellent representation…" and "…has been a competent lawyer, close friend, and trusted advisor…." The conduct complained of by the client's ex-husband's attorney in the prior discipline occurred in 1982-83 and primarily concerned the failure to set up a trust for the client in accord with the terms of the settlement agreement that resolved the dissolution of marriage case, borrowing trust funds from a client

without first advising the client in writing to seek the advice of independent counsel, and charging the client a contingent fee in a dissolution of marriage proceeding. Such conduct is not similar to the conduct alleged in the 3/24/99 Petition or the 3/16/00 formal complaint and is too remote to be related to the latter in any way. Although the report of the referee does not acknowledge it, the transcript of final hearing in the prior discipline shows that Mr. Barley testified that the client insisted on having the trust set up the way he did it, that he initially declined the client's offer to loan him the funds he needed, that he advised her to seek advice of independent counsel but she declined to do so, and that the contingent fee was not charged in a dissolution of marriage proceeding but in an independent action in common law fraud based on the ex-husband's concealment of assets in his financial affidavit that was relied on in negotiating settlement of the dissolution of marriage case. The transcript of final hearing in the prior discipline also shows that the client's testimony was not in disagreement with Mr. Barley's on these points.

E.--The recommendation of discipline is not supported by findings of fact based on clear and convincing evidence or by well-reasoned application of controlling principles of law. The only violations of the Rules supported by the record of evidence is non-compliance with trust accounting practices, none of which have been shown to have adversely affected Mr. Emo, ArC, Amwest, or anyone else. Discipline for violating the Rules has been said to serve three purposes: (a) the judgment must be fair to society, both in terms of protecting the public form unethical conduct and not denying the public the services of a qualified attorney

by undue harshness in imposing an unjust penalty; (b) the judgement must be fair to the attorney, being sufficient to punish the violation and to encourage reformation and rehabilitation; and (c) the judgment must be severe enough to deter others who might be prone to commit similar violations. *The Florida Bar v. Lord*, 433 So. 2d 983 (Fla. 1983). Here, Mr. Barley has already been subjected to extremely harsh discipline before being afforded reasonable opportunity to be fully and fairly heard. It is inconceivable that the Court could now justify further discipline based on the record of these proceedings to date.

F.--There is no evidence of record to support the finding that Mr. Barley has demonstrated a "pattern of misconduct" and is guilty of "multiple offenses" warranting further discipline.

G.--The evidence of record does not support taxation of costs in favor of the Bar. The only evidence of record to support taxation of costs is the Affidavit of Mr. Spangler. His affidavit was not evidence. Mr. Spangler offered no testimony or documents in evidence to substantiate the summary representations made in his affidavit, which was submitted after the close of final hearings, and failed, therefore, to substantiate the costs accounted for in his affidavit. There is no justification for the costs attributed to "Attorney Travel" because venue for these proceedings was and remains in Leon County, the place where Mr. Spangler's office and the Bar headquarters are co-located, and because the only travel was unnecessarily occasioned by Mr. Spangler improperly scheduling a final hearing on 6/12/00 before Judge Bean in Perry, Florida. The charge for court reporting services at the 6/12/00

hearing was excessive because Mr. Spangler chose to take a court reporter from Tallahassee to Perry to cover the hearing instead of using a local court reporter. In view of the grave losses the Bar and the Court have wrongfully imposed on Mr. Barley by the way they have applied the Rules to this proceeding, it would be unconscionable to tax any costs against him for proceedings on the 3/24/99 Petition or to the extent otherwise sought by the Bar and recommended by Judge Bean.

III.—Conclusion. For all the foregoing reasons, the Court should vacate the 4/9/99 order and disapprove the 1/25/01 Report of Referee, thereby immediately authorizing Mr. Barley to resume practicing law in Florida without any further imposition of penalty or cost, and revise Rule 3-5.2 to the extent required to cure the due process deficiencies described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Amended Initial Brief has been served by U. S. Mail on Edward Iturralde, Assistant Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 8th day of October, 2001.

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John A. Barley

CERTIFICATE OF FONT SIZE AND STYLE

This brief is typed using a Times New Roman 14-point font, in accordance with Rule 9.210, Fla. R. App. P.

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John A. Barley