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 REPLY BRIEF

On Review of a Florida Bar Disciplinary Proceeding

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I.—PRELIMINARY STATEMENT. This reply brief addresses the representations and arguments made by the Bar in its answer brief. The abbreviations employed in this reply brief are consistent with the abbreviations used in the amended initial brief. The sequence of argument that is presented in this reply brief follows the sequence of representations and arguments made in the Bar's answer brief.

II.—ARGUMENT. The Bar says "Mr. Barley took trust funds deposited for the specific purpose of funding a settlement, without the authorization of his client." (Ans. Br., pg. 2, 1st paragraph, last sentence). That statement is incorrect in the following respects:

- **There is no competent evidence of record to show that Mr. Barley "took" any trust funds; and**
- **The competent evidence of record is undisputed that:**
  - **On 10/30/97 $76,760.68 was delivered by ArC and received by Mr. Barley's law firm on 10/30/97 for deposit in the law firm's trust account for the specific purpose of funding a settlement proposed by a 10/29/97 letter from Mr. Barley to Mr. Lamb;**
  - **By the end of the day on 10/30/97 the 10/29/97 proposed settlement was rejected and the funds were then no longer needed for the proposed settlement;**
  - **Mr. Barley then advised the client that it was no longer necessary for his law firm to hold the funds and the client then elected to leave the funds with Mr. Barley's law firm;**
  - **On 10/31/97 a settlement was agreed to that addressed the same issues proposed to be resolved by the 10/29/97proposed settlement;**
  - **The 10/31/97 settlement provided for the project owner to make all payments required for the settlement to be closed and did not require ArC to provide any funding;**
  - **There was then and thereafter no likelihood that the $76,760.68 ArC had delivered to Mr. Barley's law firm to be used to fund any settlement;**
  - **On and after 11/5/97 Mr. Barley authorized his law firm to draw from the $76,760.68 to meet its operating expenses and credited all such draws to ArC's account for payment of the legal services it rendered and the costs it incurred in continuing to represent the interests of Arc and its surety in all matters in dispute with the project owner and ArC's subcontractors until all such matters were finally resolved;**

- **ArC indulged Mr. Barley's law firm's use of the $76,760.68 to the extent described above until such representation was concluded by a settlement that was closed on or about 9/11/98;Mr. Barley's law firm then provided ArC with a final statement fully accounting for the use it had made of the $76,760.68, showing that $55,666.98 had been applied to pay the total amount billed for legal services rendered and costs incurred in representing the interests of ArC and its surety from 11/15/97 to 9/11/98 that had not otherwise been paid by ArC, and that $21,093.70 was due to be returned to ArC for the unexpended balance of such funds;**
- **Mr. Barley's law firm then sent ArC a check for $21,103.70 and ArC accepted and negotiated that check to account for its receipt of the unexpended balance of the $76,760.68 that was due to be returned to ArC, plus $10.00;ArC never raised any objection or question to Mr. Barley or his law firm concerning any of the statements it issued to ArC, never hesitated to advance the funds Mr. Barley periodically asked for to cover his law firm's operating expenses, and never hesitated to promptly pay the law firm the total amount billed in its statements; and**
- **The attorney fees and costs described and accounted for in the statements Mr. Barley's law firm issued to ArC to bill ArC for the legal services the law firm rendered and the costs it incurred in representing the interests of ArC and its surety from 7/30/97 to 9/11/98 were authorized by agreement between ArC and the law firm, and were reasonable and necessary to provide such representation.**

The Bar next contends that the procedural history of this case begins on 3/17/00 with the filing of the 3/16/00 complaint, and that the part of Mr. Barley's amended initial brief that addresses prior proceedings is not before the Court. The Bar, however, fails to provide any authority to support that contention and otherwise fails to present compelling argument to sustain that contention. Moreover, the absurdity of that contention is apparent from a plain reading of Rule 3-5.2. The proceedings authorized by that Rule may occur in several different stages; namely:

- **Stage one--filing a petition for emergency suspension, *ex parte* consideration of the merits of the petition, and entry of an order granting or denying the petition;**
- **Stage two—if the petition is granted, either:**
  - **Filing a motion to dissolve an order granting a petition for emergency suspension, referring the motion to a referee for**

hearing and filing a report stating the referee's findings, conclusions, and recommendations on the disposition to be made of the Motion, and entry of an order granting or denying the Motion, or

  - **Filing a formal complaint on the claims stated in the petition, referring the complaint to a referee for hearing and filing a report stating the referee's findings, conclusions, and recommendations on the disposition to be made of the claims asserted in the complaint; and**

- **Stage three—review of the report and recommendations of the referee and any other matter of record that may be the proper subject of review, and entry of a final order approving or disapproving the report and recommendations of the referee and finally disposing of all issues on review.**

Thus, it is apparent that until a final order is entered, the case is not concluded. It is also apparent that the first time an affected attorney is afforded any meaningful opportunity to address substantive and procedural irregularities in the Rule and the way it is applied in his case is when the case is ripe for review and final disposition by the Court. In this case, a final order has not yet been entered and Mr. Barley has not yet been afforded an opportunity to be fully and fairly heard on his constitutional challenges to the Rule and the way it has been applied to him. To the extent it is necessary to refer to proceedings in the case that pre-date the filing of the 3/16/00 complaint to address those constitutional challenges, it is necessary and appropriate to reference the record of those proceedings in addressing the issues that dispose of those challenges.

The Bar next argues that "Mr. Barley failed or neglected to" mention a number of things. (Ans. Br., pgs. 3-5) for the apparent purpose of suggesting that omission of the matters referred to were intended to avoid responsibility

for any of the delays that have caused this case to remain unresolved for so long.

In his initial brief, Mr. Barley fully addressed the 5/10/99 telephonic conference with Judge Murphy, acknowledged the hearing on his 4/19/99 Motion was then set for 5/28/99, and that the hearing was thereafter changed to 6/4/99 by agreement of counsel and the referee's consent in order to allow Mr. Barley to participate in a hearing in a pending civil case in Trenton, Florida. When the Bar objected to the initial brief exceeding 50 pages and the Court ordered Mr. Barley to file an amended initial brief within that limit, Mr. Barley was unable to retain all the information in the amended initial brief that he had included in the initial brief. As is evident from the 5/20/99 and 5/21/99 letters exchanged between Mr. Harper and Mr. Spangler, the need to change the initial date of the hearing on Mr. Barley's 4/19/99 Motion occurred only after Mr. Spangler retreated from the understanding reached with Mr. Harper and Judge Murphy during the 5/10/99 telephone conference (that the hearing on Mr. Barley's 4/19/99 Motion would commence at 9:00 A. M. on 5/28/99, be confined to the record of proceedings in the Court without the Bar calling any witnesses to testify, and would be concluded within 2 hours), and insisted that a full day be devoted to the hearing and calling 2 or 3 witnesses to testify. The 5/20/99 letter from Mr. Harper to Mr. Spangler that was referenced in and attached to Mr. Barley's 5/28/99 Motion remains a part of the record, is included in the Appendix, and provides a record account of the 5/10/99 telephonic conference with Judge Murphy and the circumstances that led Mr. Barley to request that the hearing on his 4/19/99 Motion be continued to 6/4/99.

Neither the initial brief nor the amended initial brief sets forth the specific findings of fact made by Judge Murphy in his 6/15/99 Report of Referee, but that Report remains a part of the record, is included in the Appendix, and speaks for itself. The only part of that Report that was and remains germane to the issues on appeal is the conclusion of law it reached; namely: the Bar failed to show by clear and convincing evidence that it has a substantial likelihood of prevailing on the merits of its claim that Mr. Barley is causing great public harm. Mr. Barley's failure to mention that Judge Murphy requested that another judge be assigned to preside over any further proceedings in the case was intentional because the form and content of those requests were not sufficient to warrant consideration and action by the Court, and the record does not show that those requests were the subject of any consideration or action by the Court.

Neither the initial brief nor the amended initial brief mention that on 5/8/00 Mr. Barley filed a Motion for Continuance of the final hearing noticed by Mr. Spangler for 6/12/00. Exclusion of any reference to that Motion was an oversight when Mr. Barley was stating the procedural history of the case. However, both briefs mention the pleadings and other motions Mr. Barley filed on 5/8/00, and reference to the transcript of the 6/12/00 hearing provides a record account of all Mr. Barley's pleadings and motions, including his Motion for Continuance, being heard and ruled upon. In particular, that transcript shows that when his Motion for Continuance was taken up, Mr. Barley advised Judge Bean and Mr. Spangler that the title to the Motion was incorrect, that he intended to title the Motion "Motion To Strike Notice of Final Hearing," he then orally amended the title of the Motion accordingly, and the Motion was then considered and granted. That transcript also shows that the case was abated because Mr. Barley's arguments in support of his Motion to Abate persuaded Judge Bean to grant the Motion, and because Judge Bean did not have time on his calendar to conduct the final hearing until after the 9/15/00 jury trial on ArC's civil complaint against Mr. Barley was scheduled to be concluded.

The primary reasons it became impossible for the Referee to file his report with 90 days from the date the 3/16/00 complaint was filed were:

- **Mr. Spangler unnecessarily delayed filing the complaint for nearly 50 days when it could have been filed by no later than 1/31/00 if what he represented to Judge Murphy on 6/4/99 was true when he said the formal complaint is already drafted, it mirrors the allegations of the Bar's 3/24/99 Petition, and the only reason he had not already filed it was because the complaint could not be prosecuted unless and until Mr. Barley's 4/19/99 Motion was denied;**
- **Mr. Spangler incorrectly filed the complaint with the Clerk of the Court, asked the Clerk to establish a new case, and asked the Clerk to appoint a new referee;**
- **The Clerk unhesitatingly obliged Mr. Spangler in granting those requests and sent the complaint to the Chief Judge of the Third Judicial Circuit for with an order from the Chief Justice inexplicably directing appointment of a new referee;**
- **The Chief Judge of the Third Judicial Circuit then inexplicably appointed a judge other than Judge Murphy to serve as referee, thereby ensuring that the referee would be unfamiliar with the case;**

- **The new referee, Judge Bean, did not react to his appointment by promptly scheduling and conducting the proceedings necessary to get through a final hearing on the complaint in time to provide him with reasonable opportunity to file a report within 90 days from 3/16/00; and**
- **Mr. Spangler then improvidently undertook to default Mr. Barley to deny him any reasonable opportunity to be heard on the claims made in the 3/16/00 complaint, and thereafter wasted more than a month (from 5/8/00 to 6/12/00) obdurately attempting to enforce his illegal default of Mr. Barley.**

If when Mr. Spangler received a copy of the Court's 1/26/00 order he had simply sent to Judge Murphy the formal complaint he represented to Judge Murphy on 6/4/99 was already drafted, mirroring the allegations of the Bar's 3/24/99 Petition, and then served a copy on Mr. Barley, and if Mr. Spangler had then advised Judge Murphy of the need to conclude a final hearing on the complaint and file his report and recommendations within 90 days from the day the complaint was filed, there is no reason to believe a final hearing on that complaint could not have been conducted in time to allow Judge Murphy to file his report and recommendations on the complaint within the 90 day period of time provided by Rule 3-5.2 (f).

The initial brief mentioned that at the outset of the 10/20/00 final hearing, Mr. Barley orally asked Judge Bean to further abate the case because the state had recently charged him with grand theft based on a complaint by Mr. Emo that replicated ArC's Bar complaint, ArC's civil complaint, the Bar's 3/24/99 Petition, and the Bar's 3/16/00 complaint, and because he did not want to prejudice his rights in the criminal proceedings required to resolve that charge through the testimony he would necessarily have to give in a final hearing on the 3/16/00 complaint. Because space was not available, the amended initial brief mentioned that the 10/20/00 final hearing proceeded over Mr. Barley's objections, but did not expressly state the grounds for those objections. The transcript of the 10/20/00 final hearing is part of the record, is included in the Appendix, and provides a full account of Mr. Barley's request for further abatement of the case and the grounds he presented for Judge Bean's consideration in making that request. Both the initial brief and the amended initial brief mention that on 11/21/00 Mr. Barley orally asked continuance of the final hearing for the reasons indicated in his 11/17/00 letter to Judge Bean, and that his request was then granted, thereby rescheduling the last part of the final hearing to 1/10/01. The transcript of the 11/21/00 hearing is part of the record, is included in the Appendix, and provides a full account of Mr. Barley's request for continuance of the final hearing, and the grounds he presented for Judge Bean's consideration in making that request.

By letter to the Clerk of the Court dated 7/20/00 Mr. Spangler asked that the 90 day period of time that is provided by Rule 3-5.2 (f) for the Referee to file his Report and Recommendations on the 3/16/00 complaint be extended. By letter dated 8/4/00 Mr. Barley objected to that request. Mr. Barley's 11/2/00 letter to the Clerk of the Court was in response to the 10/30/00 letter from Mr. Spangler requesting another extension of the time provided by Rule and relied on the same reasons expressed in his 8/4/00 letter for opposing Mr. Spangler's request. As is apparent from a plain reading of the letters, the reason Mr. Barley wrote his 8/4/00 and 11/2/00 letters had nothing to do with the length of time it took to conclude the final hearing and file the Report of the Referee, and everything to do with opposing an after-the-fact request that seemed intent upon facilitating entry of an order extending the time limit provided by the Rule to avoid the condition that caused the temporary suspension imposed by the 4/9/99 order to be automatically terminated. Those letters are part of the record, are included in the Appendix, and should be read in the context of Mr. Barley's 9/20/00 Second Motion to Dissolve.

The transcript of the 11/3/00 final hearing shows that Judge Bean then closed the final hearing to presentment of any further evidence on the issues of guilt on the Rules violations charged in the 3/16/00 complaint, and directed the parties to submit closing arguments on the evidence adduced on those issues. The record and the Appendix show that on 11/17/00 Mr. Barley submitted his closing argument on those issues under cover of a letter to Judge Bean of even date. The transcript of the 1/10/01 final hearing shows that Mr. Barley asked for an opportunity to submit closing arguments in written form, and that Judge Bean, without objection from Mr. Spangler, then set 1/16/01 as the deadline for both parties to do so. The initial brief provided an account of Mr. Barley's request for an additional day to submit his closing arguments and referenced the 1/17/01 letter and Motion that are part of the record substantiating that request and Mr. Spangler's consent to that request being granted. Limitations on length of the amended initial brief precluded inclusion of that account. The record and the Appendix show that on 1/16/01 and 1/17/01 Mr. Barley wrote Judge Bean to explain why he was unable to complete and deliver his closing submittals by 1/16/01 and asked for a one day extension of time to do so. A fair reading of the Motion to Reconsider Report of Referee As To Guilt will show that the Motion expressed Mr. Barley's second round of closing arguments, based on all the evidence adduced at final hearing, to show that the Referee's 12/18/00 Report was entered in error and should be amended to the extent required to find and conclude that the Bar failed to present sufficient clear and convincing

evidence to sustain most of the charges made in its 3/16/00 complaint and that Mr. Barley is not guilty of violating Rules 4-1.5 (a), 1-1.15 (a), 4-1.15 (b), 4-8.4 (c), and 5-1.1 (a), that he is guilty of violating Rules 4-1.15 (d) and 5-1.2 (b), that his temporary suspension be immediately terminated, and that he be required to complete eight hours of approved continuing legal education course work on the proper maintenance of trust records.

Neither the initial brief nor the amended initial brief included any reference to the motions Mr. Barley filed seeking to enlarge the time provided for him to serve his initial brief. That omission was the result of Mr. Barley's understanding that the procedural history of the case ended with the Bar filing its cross-petition for review.

As noted above, it appears that the Bar's purpose in bringing to the Court's attention the perceived omissions addressed on pages 3-5 of the Answer Brief was to suggest that Mr. Barley has substantial responsibility for the slow progress of this case. While it is true that some of the delays experienced to date in moving the case to final disposition were caused by Mr. Barley, those delays are slight in length of time and in adverse impact on Mr. Barley in comparison to the delays caused by the Bar and the Court's administration of the case. If the case had been prosecuted properly, the Bar would have filed a formal complaint immediately after receiving ArC's 10/26/98 Bar complaint, and would not have filed its 3/24/99 Petition, or would have filed the complaint at or before the time it filed the Petition. If the case had been administered properly, the Court would not have granted the Bar's 3/24/99 Petition, and after improvidently doing so, would have followed the dictates of Rule 3-5.2 in promptly appointing a referee to hear and report on the merits of Mr. Barley's 4/19/99 Motion, would have promptly considered and acted on the referee's report, and, if it found the report deficient in any respect, would have promptly remanded the case to the same referee to conduct such further proceedings as necessary to cure those deficiencies and yield an acceptable amended report, would have promptly considered and acted on the amended report, would have entered an order granting or denying the Motion, and if it decided to deny the Motion, would then have ordered the referee to proceed to final hearing on the complaint. All of those proceedings could have been concluded well before 7/28/99 when Mr. Harper ceased his representation of Mr. Barley and moved to withdraw as counsel of record for Mr. Barley. Until then, Mr. Barley had sufficient legal representation to promptly act in defense of the Bar's claims and seek appropriate relief from the Bar's draconian tactics to prevent him from being able to continue practicing law. After 7/28/99, Mr. Barley was without legal representation from Mr. Harper or any other attorney, and had to try to

represent himself, a position of weakness that the Bar fought hard to obtain to increase the odds of prevailing on its claims against Mr. Barley. Mr. Spangler's expressed reason for filing the 3/24/99 Petition and his tactics in prosecuting the 3/16/00 complaint are clear evidence of the unfair strategies the Bar employed to prevail at any cost, even if in doing so, Mr. Barley was deprived of reasonable opportunity to be fully and fairly heard on the merits of the Bar's claims against him and to avoid the substantial loss and damage that he has suffered from being summarily suspended from practicing law.

The Bar's first formal argument is that Mr. Barley's constitutional challenges have already been considered and decided adverse to him by the Court's 8/24/00 opinion and order, and by its 2/20/01 order denying his Motion for Rehearing, his Second Motion to Dissolve, and his Motion to Correct Administrative Errors, or are mooted by the findings, conclusions, and recommendations of the 1/25/01 Report of Referee, or are waived because they were not raised in his Petition for Review. That argument is without merit for the following reasons.

First, Mr. Barley's constitutional challenges have not yet been considered and decided by the Court. The Court's 8/24/00 opinion and order did not address and decide the issues that dispose of the constitutional challenges Mr. Barley has raised on review. Mr. Barley's Motion for Rehearing, Second Motion to Dissolve, and Motion to Correct Administrative Errors did not address the issues that dispose of his constitutional challenges or seek relief from the deprivations described in those challenges. The Court's 2/20/01 order did not address and decide the issues that dispose of his constitutional challenges.

Second, Mr. Barley's constitutional challenges are not moot. The controversy has not been so fully resolved that a judicial determination of the issues raised by those challenges can have no actual effect. If Mr. Barley prevails on those challenges, the entire proceedings to date are infirm, the temporary suspension must be vacated, Mr. Barley must be compensated for the constitutional deprivations he has suffered, and the Bar must be ordered to either proceed in accord with due process of law or abandon further efforts to prosecute the claims asserted in its 3/24/99 Petition and in its 3/16/00 complaint. Mr. Barley's constitutional challenges present an actual controversy, and the issues raised by those challenges continue to be unresolved by any final decision yet rendered in this case. The questions raised by Mr. Barley's constitutional challenges are of great public importance, and are likely to recur. Collateral legal consequences that affect Mr. Barley's rights flow from the issues to be determined in deciding the merits of his constitutional challenges.

Third, this case is an original proceeding in the Court. Because the proceeding was initiated by the Bar filing its 3/24/99 Petition under Rule 3-5.2, because Mr. Barley was temporarily suspended by the Court's order on the Petition, because this case proceeded uninterruptedly from the filing of the Petition to date, and because the Report of the Referee recommends suspension in proposing the terms on which the case is finally decided, the Court has a non-discretionary duty to review the Report of the Referee.[1] In this case, therefore, the filing of a petition for review was a mere formality, not a prerequisite to vesting the Court with jurisdiction to review the Report of the Referee and any other matter raised on review that is collateral to the issues addressed in the Report. Rule 3-7.7 (a) provides for review of the report of a referee and advises what must be done to preserve the right to obtain review of any part of such a report, but does not advise what, if anything, must be done to preserve the right to obtain review of any other matter collateral to the issues addressed in the report. In the absence of any express provision in the Rules stating the procedure to follow to preserve his right to obtain review of his constitutional challenges, Mr. Barley had no way to know that his petition for review should also include mention of those challenges. Therefore, it cannot be said that Mr. Barley was on notice that such issues must be mentioned in his petition in order to preserve his right to obtain the Court's consideration of his constitutional challenges, or that he knowingly waived that right.

The Bar's second formal argument is that Rule 3-5.2 is not unconstitutionally vague, Mr. Barley was given his due process right to notice and opportunity to be heard, and the Rule does not deny due process or equal protection of law on its face or as applied to Mr. Barley. That argument is without merit for the following reasons.

First, the Bar argues that application of the Rule to Mr. Barley did not violate his right to equal protection because all attorneys are treated in the same manner under the Rule and Bar policy. The way the Bar treats other attorneys under the Rule is not before the Court in this case. Nor is there any way for the Bar to demonstrate that such is the case on the record of evidence in this case, because the Bar presented no such evidence in this case. Just

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[1] See Rule 3-5.2 (g) and Rule 3-7.7 (2) of The Rules Regulating The Florida Bar.

because all other attorneys may treated the same way under the Rule does not mean that the Rule, on its face or as applied, does not deny Mr. Barley equal protection of law. In discussing the Rule and its usual application, the Bar contends that the Rule does not provide for *ex parte* petitions because the affected attorney is provided a copy of the petition and is given an opportunity to respond. To the contrary, however, nowhere in the Rule is there any provision for the affected attorney to be served a copy of the petition or to be heard on the petition before the Court decides whether to grant or deny the petition.

Next, the Bar argues that on 3/26/99 Mr. Barley filed a Response to the 3/24/99 Petition and on 4/1/99 filed a supplemental answer attaching a copy of his 3/30/99 verified Response to the allegations of ArC's Bar complaint, and that Mr. Barley's statements in his 3/30/99 Response support entry of an order granting the Petition and suspending him from practice of law because they acknowledge that he misappropriated funds deposited in trust for a specific purpose. Such an interpretation of Mr. Barley's verified statements in his 3/30/99 Response cannot reasonably be sustained. Not only does such an argument beg the question (the 1/25/01 Report of the Referee not conclude that Mr. Barley "misappropriated" any trust funds), but when the totality of those statements are considered in light of the additional information provided by the documents referenced in and attached to Mr. Barley's 3/30/99 Response, it is clear that such statements created genuine dispute of the facts material to any fair and impartial determination of whether Mr. Barley caused any of the funds his law firm was holding in trust to be subjected to any unauthorized use, that the affidavits of Mr. Emo and Mr. Wells are based on half-truths, and that the opinions of Mr. Wells were legally insufficient to establish Mr. Barley "misappropriated" any trust funds. Moreover, such an argument presumes the Bar or the Court considered the verified statements made in Mr. Barley's 3/30/99 Response, but, as pointed out in the arguments advanced in his amended initial brief, the record indicates otherwise. Neither the Court's 3/31/99 order nor the Bar's 3/31/99 Reply reveal even the slightest acknowledgement that Mr. Barley's 3/30/99 Response had been filed or that it rebutted most of the material allegations of the 3/24/99 Petition and its supporting affidavits. Nor did the Court or the Bar thereafter acknowledge that Response before the Court issued its 4/19/99 order. As Mr. Barley argued in his amended initial brief, the Court could not have granted the 3/24/99 Petition if it had fairly and impartially considered the Petition and its supporting affidavits in light of the countervailing allegations and verified statements contained in Mr. Barley's 3/26/99 Response and 3/30/99 Response.

The Bar next argues that the Rule provides an opportunity for an affected attorney to file a motion to dissolve an order of temporary suspension, and that Mr. Barley availed himself of that opportunity. In making that argument, however, the Bar does not demonstrate how that provision of the Rule or Mr. Barley's use of that provision somehow cured all the due process deficiencies in the Rule, on its face and as applied, that were pointed out by the arguments advanced in Mr. Barley's amended initial brief.

The Bar next argues that the Rule, on its face and as applied, provided Mr. Barley with all the substantive and procedural due process rights safeguarded by the constitution. In making that argument the Bar completely ignores most of the due process deficiencies in the Rule, on its face and as applied, that were pointed out in Mr. Barley's amended initial brief, and completely disregards the analysis provided by the cases cited in Mr. Barley's amended initial brief. The cases cited by the Bar and the principles of law quoted from those cases do not, in most part, apply to the operative facts of this case, and do not outweigh the controlling authority of the cases cited in Mr. Barley's amended initial brief. No matter how much the Bar contends otherwise, the Rule ***does not provide an affected attorney with any right to be heard on the merits of a petition for emergency suspension before the Court imposes a temporary suspension, does not provide a right for the attorney to obtain a stay or supersedeas of a temporary suspension until he can be heard on the merits of the petition, and does not provide a right for the attorney to have a prompt post-suspension hearing and a prompt final determination of all issues in dispute.***

The fact that Mr. Barley filed responses to the 3/24/99 Petition before the Court issued its 4/9/99 order does not constitute evidence that the Rule provided him an opportunity to be heard on the merits of the Petition before the Court decided to grant the relief sought by the Petition. To the contrary, the fact that Mr. Barley filed those responses is merely evidence that he was being diligent in attempting to oppose the Petition in every legitimate way he could to avoid the drastic results imposed by the Court's 4/9/99 order. Without the benefit of a hearing before the Court to address the merits of the Petition in light of his countervailing allegations and verified statements, Mr. Barley had no way to know whether the Court would fairly and impartially consider those allegations and statements in judging the legal sufficiency of the Petition and its supporting affidavits, and, if it did, to try and influence such considerations through argument of law.

The Bar next argues that the Rule afforded Mr. Barley the right to be heard on his 4/19/99 Motion, on the Court's consideration of the 6/15/99 Report of the Referee, on the Bar's 3/16/00 complaint, and on review of the

1/25/01 Report of the Referee, and the delays he experienced in obtaining those hearings were primarily attributable to his requests for delays and recalcitrance. It cannot be reasonably said that Mr. Barley did or failed to do anything that materially delayed the process of prosecuting his 4/19/99 Motion to an appropriate conclusion. When on 5/10/99 Mr. Barley agreed to schedule the Motion for hearing on 5/28/99, he was acting on the understanding that the Motion was staying the effect of the 4/9/99 order and that he was permitted to continue to practice law unless and until the Motion was denied. When Mr. Barley asked to reschedule the 5/28/99 hearing to 6/4/99, he was acting on the understanding that on 5/13/99 the Bar had changed its mind about the effect of the 4/19/99 Motion and the nature of the hearing that would be conducted on the Motion, and had no reasonable alternative but to try and reschedule the hearing to avoid indefinitely postponing another hearing on a matter of great importance to one of his clients that had been set before previously set. That one-week delay can hardly be said to be a major factor in causing final disposition of Mr. Barley's 4/19/99 Motion to be delayed until 1/26/00, or causing final disposition of his 5/28/99 Emergency Motion to be delayed until 8/24/00. No, the primary reasons why final disposition of those two motions was delayed so long is the Rule did not expressly require otherwise, and the Court did not see fit to sooner consider and act on either. It is inconceivable that the Bar or the Court could consider such delay to have been reasonable in this or any other case.

The Bar next argues that misappropriation is synonymous with great public harm and tortuously reasons that because the Rule has its origins from earlier rules that expressly stated that an attorney appears to be causing great public harm by misappropriating funds to his own use, even though that language was expressly stricken when the Rule was adopted, one should understand that the Rule implies an attorney is causing great public harm when he misappropriates funds to his own use. Such an argument is patently absurd and does not meet the constitutional test for due process under the controlling law cited in Mr. Barley's amended initial brief. In order for a penal rule or law to be valid, it must unequivocally inform those to whom it applies of the conduct that is prohibited and subject to penalty. If the rule or law is subject to more than one reasonable interpretation and leaves those to whom it applies to guess at the conduct that is prohibited, the rule or law is constitutionally infirm for vagueness and denies due process of law. The Rule simply fails to meet that test.

The Bar next argues that attorneys are not entitled to the *supersedeas* provisions of Chapter 120 like other licensees because attorneys are not the same as other licensees and are afforded an extraordinary degree of trust by

their clients and the public at large. That argument is also patently absurd. Are not many other licensees, like accountants, architects, engineers and physicians for example, afforded an extraordinary degree of trust by their patients and the public at large? The truth is that there is no valid distinction between such licensees that makes any legitimately justifiable difference in providing for one to be entitled to the due process protection provided by the right to obtain *supersedeas* of an agency order temporarily suspending his license, and denying that right to another. The Bar's policy on emergency suspension is irrelevant to determining the constitutionality of the Rule, on its face and as applied to Mr. Barley in this case. That policy is not what determined the provisions of the Rule or how those provisions were applied in this case. Ironically, however, it is apparent the Bar did not apply that policy in this case the way it reads. For example, the Bar knew the allegations made by ArC on 10/26/98, knew Mr. Barley's answer to those allegations by 12/4/98, and by 1/14/99 knew the content of the trust accounting records maintained by Mr. Barley's law firm. Yet, the Bar waited until 3/24/99 to file its Petition for Emergency Suspension. Moreover, the primary reason the Bar gave for then filing the Petition was Mr. Barley's delay in filing a response to ArC's Bar complaint, not because the Bar had found that "information exists that clearly establishes a misappropriation." Nor does the policy provide any objective criteria to guide the Bar in determining whether such information exists or whether facts exist that clearly establish that the attorney shall not cause great public harm if emergency action is not taken. Last, the record of proceedings in this case does not include that policy, or a written account of how that policy was applied to Mr. Barley in deciding to file the 3/24/99 Petition.

The Bar next argues the principle of law that has been often espoused by the Court in earlier disciplinary cases; namely: the referee's findings of fact enjoy a presumption of correctness and will be upheld, not reweighed, or substituted by the Court unless the challenging party shows that the facts are not supported by any competent substantial evidence of record. That general principle of law may be well-settled, but it does not apply in this case quite as simply as the Bar suggests. The first thing that must be done in testing the validity of the referee's findings of fact is to identify what they are. The next thing that must be done is to determine whether there is any competent substantial evidence of record to support the findings. In making the latter determination, one must determine whether any evidence that supports or tends to support the findings is "clear and convincing evidence." The only way such a determination can be correctly made is to critically evaluate such evidence to determine whether it meets the test of what constitutes "clear and

convincing evidence." In his amended initial brief, Mr. Barley argues that many of the findings of fact expressed in the 1/25/01 Report of Referee are not supported by substantial competent evidence of record because either there is no evidence at all to support the findings or the only evidence to support the findings does not meet the test of "clear and convincing evidence." Those arguments specifically stated the findings of fact that are not supported by competent substantial evidence of record and pointed out why that is the conclusion the Court should reach in its review of the 1/25/01 Report of the Referee. The Bar's arguments to the contrary do not squarely address the specific findings and evidentiary deficiencies pointed out by Mr. Barley's arguments.

Last, the Bar argues that the discipline recommended by the 1/25/01 Report of Referee is not consistent with the prior decisions of the Court, and that those prior decisions show that Mr. Barley's discipline should be disbarment. First, if the Court agrees with any part of Mr. Barley's constitutional challenges, the proceedings that resulted in issuance of the 1/25/01 Report of Referee would be too tainted to support any finding of guilt on the charges asserted in the 3/24/99 Petition or in the 3/16/00 complaint. Second, if the Court does not agree with any of Mr. Barley's constitutional challenges but agrees with any part of Mr. Barley's arguments concerning the quality and quantity of the evidence of record, the extent to which Mr. Barley may be found guilty of the charges asserted in the 3/24/99 Petition or in the 3/16/00 complaint will be less than is provided by the 1/25/01 Report of Referee. Third, if the Court does not agree with any of Mr. Barley's arguments in the foregoing respects, the findings of fact expressed in the 1/25/01 Report of Referee do not support some of the conclusions of law that are interspersed in those findings and in the recommendations included in the Report, and some of those conclusions of law are not adequately supported by findings of fact. This is particularly true of the erroneous conclusions that Mr. Barley:

- **Manipulated Mr. Emo into allowing the $76,760.68 to remain in his custody;**
- **Charged or collected any illegal, prohibited, or clearly excessive fee;**
- **Engaged in any conduct involving dishonesty, fraud, deceit, or misrepresentation;**
- **Engaged in a pattern of misconduct; or**
- **Is guilty of multiple offenses.**

As is pointed out by the arguments advanced in Mr. Barley's amended initial brief, those conclusions of law are not supported by findings of fact, and the record does not provide sufficient competent evidence to reach the findings necessary to support those conclusions.

Fourth and last, *not only does the 1/25/01 Report of Referee not contain the findings of fact required to support a legal conclusion that Mr. Barley "misappropriated" trust funds, the Report does not conclude that Mr. Barley "misappropriated" any trust funds or recommend that he be found guilty of doing so.* Nor does the record contain substantial competent evidence to support the findings of fact required to support such a legal conclusion. Absent sufficient findings of fact to support such a conclusion, any such conclusion, and any recommendation that such a conclusion be reached, Mr. Barley cannot properly be considered to have "misappropriated" trust funds and subjected to the discipline that is applied to attorneys found to be guilty of such an offense. Therefore, the Bar's argument for increasing the discipline recommended by the Referee is not supported by the record, and the cases it cites as authority for those arguments are not applicable to this case.

III.—CONCLUSION. For all the foregoing reasons, and those provided by Mr. Barley's amended initial brief, the Court should vacate its 4/9/99 order and dissolve its temporary suspension of Mr. Barley's license to practice law in Florida, disapprove of the 1/25/01 Report of the Referee, rescind and revise Rule 3-5.2 to the extent necessary to cure its substantive and procedural defects, and grant Mr. Barley such other and further relief as may be just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent/Petitioner's Reply 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 29th day of January, 2002.

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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