

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case

No. SC04-570

Complainant,

v.

LEONARDO JORGE GUERRA,

The Florida Bar File

No. 2004-71,078(11M-MES)

Respondent.

_____ /

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

The transcript of the hearing on Respondent's Motion to Dissolve Emergency Suspension will be referred to as "TR", followed by the referenced page number(s). (TR at ___).

The Report of Referee will be referred to as "ROR", followed by the referenced page number(s). (ROR at ___).

The Appendix to Respondent's Initial Brief will be referred to as "App" followed by the referenced page number(s). (App at ___).

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar adopts the Statement of the Case and of the Facts included in Respondent's Initial Brief and would supplement it with the following:

The Florida Bar attached the affidavit of Carlos J. Ruga, Branch Auditor for the Miami Office of The Florida Bar, with exhibits to the Bar's Petition for Emergency Suspension. The affidavit and exhibits evidenced Respondent's numerous misappropriations of client funds wherein he used client funds to pay personal and business obligations throughout 2003. (App 13-32).

At the hearing on Respondent's Motion to Dissolve Emergency Suspension, Mr. Ruga testified that Respondent had been engaged in a "ponzi scheme" and that he misappropriated funds from numerous clients throughout 2003. Mr. Ruga further testified that Respondent had to borrow in excess of \$75,000 of family funds to cover shortages in his trust account. (TR at 30-51).

SUMMARY OF THE ARGUMENT

Respondent has not established that the Referee erred by denying his motion to dissolve his emergency suspension. The Referee's ruling that the Bar demonstrated a likelihood of prevailing on the merits of each element of its underlying petition and that Respondent's suspension should remain in force without amendment is consistent with this Court's directive issued in the order of appointment of referee and rule 3-5.2(e)(2) of the Rules Regulating The Florida Bar. Respondent argues that the Referee should not have been confined to this Court's directive contained within the order of appointment of referee and rule 3-5.2(e)(2), and that the Bar should have been required to make a showing that Respondent was causing great public harm. The Bar clearly established that Respondent was causing great public harm. Respondent's argument is without merit as it is in contravention of the Rules Regulating The Florida Bar and this Court's order of appointment of referee. Accordingly, this Court should approve the Report of Referee and leave Respondent's suspension in force without amendment.

ARGUMENT

On April 22, 2004, this Court issued an order of appointment of referee in this matter. The assigned Referee diligently followed said order to the letter of the law. Said order gave the referee the following directive,

The referee shall hear, conduct, try, and determine the matters presented **within seven days from the date of assignment** and thereafter shall submit a report and recommendation to the Supreme Court of Florida **within seven days of the date of the hearing** as provided in rule 3-5.2(e)(2).

Specifically, Rule 3-5.2(e)(2) states,

The referee shall hear such motion within 7 days of assignment, or a shorter time if practicable, and submit a report and recommendation to the Supreme Court of Florida within 7 days of the date of the hearing, or a shorter time if practicable. *The referee shall recommend dissolution or amendment, whichever is appropriate, to the extent that bar counsel cannot demonstrate a likelihood of prevailing on the merits of any element of the underlying complaint. (Emphasis Supplied).*

When Rule 3-5.2 was adopted, this Court succinctly addressed the Bar's burden in a motion for dissolution/amendment of an emergency suspension,

We also have specified that, *in the hearing on a motion to dissolve or modify an emergency order*, The Florida Bar will bear the burden of *demonstrating a likelihood of succeeding on the merits of the underlying complaint*. The Florida Bar re Amendments to the Rules Regulating The Florida Bar 1-3.7;3-5.1(g); 3-5.2;14-1.1 and Chapter 15, 593 So.2d 1035, 1037 (Fla. 1991). (Emphasis Supplied).

In the instant case, the Referee specifically found that, "...for my limited purpose under Rule 3-5.2(e)(2), I find that the Bar has presented a sufficient case

to prevail on the issue of misappropriation of funds on a trust account -- at least at this stage. So I'm not going to dissolve the complaint/petition..." (TR at 84-85). Furthermore, in the Report of Referee, the Referee noted that, "the Bar has demonstrated a likelihood of prevailing on the merits on each element of its Petition for Emergency Suspension" (ROR at 2), and he recommended that, "Respondent's Motion to Dissolve Emergency Suspension be denied and that Respondent's suspension remain in force without amendment." (ROR at 2).

Respondent states the Bar did not make a showing to the Referee that he caused great public harm. The Bar takes issue with that as it presented the testimony of the Branch Auditor who established that Respondent had been engaged in a "ponzi scheme" and that he misappropriated funds from numerous clients throughout 2003. Respondent used his trust account as if it was his personal bank account. Respondent had to borrow in excess of \$75,000 of family funds to cover shortages in his trust account. (TR at 30-51).

Furthermore, pursuant to rule 3-5.2(a), great public harm is what must be shown to this Court when filing a petition for emergency suspension. It is not the standard before the referee on a motion to dissolve/amend an emergency suspension pursuant to rule 3-5.2(e)(2).

As noted in Rule 3-5.2(a), this Court has the option as to whether or not to issue an emergency suspension. On April 8, 2004, this Court issued such a

suspension. Once this Court issues an emergency suspension and a respondent files a motion to dissolve/amend, the referee is called to look solely to Rule 3-5.2(e)(2).

Essentially, Respondent attempted to conduct the final hearing during his motion to dissolve his emergency suspension. Respondent sought to present evidence of his repayment of misappropriated funds. This was not the final hearing. At this stage, it was irrelevant why Respondent misappropriated the funds and whether he did or did not reimburse said funds.

In essence, Respondent is requesting that this Court legislate a new rule that favors his position. Respondent's position is illogical, as it would essentially amount to a final hearing being conducted on two (2) occasions.

A careful review of Rule 3-5.2, in its entirety, the transcript of the April 30, 2004 hearing on Respondent's Motion to Dissolve Emergency Suspension (included in Appendix to Respondent's Initial Brief), and the Report of Referee, in conjunction with Respondent's Initial Brief, leads to only one conclusion. Respondent is asking this Court to ignore its April 22, 2004 order of appointment of referee and to completely disregard the specific language of Rule 3-5.2.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that the Report of Referee be approved and that the emergency suspension remain in force without amendment as recommended by the Referee in this cause.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Answer Brief was sent via Federal Express (FedEx tracking no. 809685734804) to the Honorable **Thomas D. Hall**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399; and a true and correct copy was mailed to **Richard B. Marx**, Attorney for Respondent, at 66 West Flagler Street, Floor 2, Miami, Florida 33131; on this _____ day of _____, 2004.

WILLIAM MULLIGAN
Bar Counsel

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

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

WILLIAM MULLIGAN
Bar Counsel