IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LEONARDO JORGE GUERRA,

Respondent.

_____/

Supreme Court Case
No.SC04-570

The Florida Bar Case
No. 2004-71,078(11M-MES)

RESPONDENT'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the Bar".

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 Appendix shall be referred to as "App" followed by the referenced page number(s). (App at ____).

STATEMENT OF THE CASE AND FACTS

On March 30, 2004 the Bar filed a petition for emergency suspension pursuant to Rule 3-5.2 based upon allegations of trust account shortages and misappropriation of client funds. The petition alleged that the allegations established, "clearly and convincingly that Respondent appears to be causing great public harm". App 01-10. On April 2, 2004 Respondent's counsel filed a pleading entitled "notice to the court of Respondent's intent to file verified response in opposition to The Florida Bar's petition for emergency suspension, on or before April 7, 2004." App 33-34. On April 6, 2004 Respondent filed the verified response in opposition to The Florida Bar's petition for emergency suspension. App 35-46. The verified response in opposition acknowledged that although there had been irregularities in Respondent's trust accounts during 2003, as of 2004 there was no money owed to clients and the account was in compliance with trust account requirements. App 38-39.

The verified response stated that in September of 2003 Respondent hired an accountant to correct the trust account records and comply with all trust account reporting requirements. The verified response suggested less restrictive alternatives short of suspension contained in Rule 3-5.2 such as probation with special condition that Respondent be ordered to deposit all

trust funds into a special trust account which could be monitored by the Bar or a monitor which requires the approval of the Supreme Court or a referee appointed by the Supreme court before any disbursements can be made.

On April 8, 2004 this Court issued an order granting the Bar's petition for emergency suspension effective 30 days from the date of the order. App 47. On April 19, 2004 Respondent filed a motion to dissolve emergency suspension App 48 and Respondent filed an amendment to said motion April 30, 2004 App 55-56. On April 22, 2004 this Court issued an order designating Joseph P. Farina, Chief Judge for the Eleventh Judicial Circuit to immediately appoint a referee to, "hear, conduct, try, and determine the matters presented" and to "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). App 58. On April 26, 2004 the Honorable Andrew Hague was appointed to serve as Referee in this cause and a hearing on Respondents motion to dissolve emergency suspension took place April 30, 2004. On May 7, 2004 the Referee submitted the Report of Referee recommending that Respondent's Motion to Dissolve Emergency Suspension be denied and that Respondent's suspension remain in force without amendment. App 59. On May 14, 2004 Respondent filed a Petition for Review with this court.

SUMMARY OF ARGUMENT

The Referee limited the scope of Respondent's motion to dissolve emergency suspension to the exact language contained in Rule 3-5.2(e)(2), and by so doing interpreted his role as restricted to determining whether Bar Counsel demonstrated a likelihood of prevailing on the merits on any element of the underlying complaint and analogized the hearing as a "probable cause hearing" to determine whether there is probable cause that Respondent has violated any rules and if there is a finding of probable cause then the emergency suspension stays in place. The Referee refused to consider any arguments that Respondent no longer "appears to be causing great public harm". This rule should not be interpreted so restrictively. The court can and should interpret this provision of the rule to be read in conjunction with Rule 3-5.2(a). Respondent should have been given the opportunity to present evidence that proves that the facts set forth in the Bar's petition for emergency suspension do not establish clearly and convincingly that Respondent is currently causing great public harm.

THE REFEREE'S LIMITATION OF THE HEARING ON RESPONDENT'S MOTION TO DISSOLVE EMERGENCY SUSPENSION TO RULE 3-5.2(e)(2) WAS CLEARLY ERRONEOUS

The Referee interpreted the April 22, 2004 App 58 order of appointment as limiting the scope of the hearing to the exact language of Rule 3-5.2(e)(2) and no further. TR 14. The order of appointment provides in part that, "The referee shall hear, conduct, try, and determine the matters presented within seven days from the date of the 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)." App 58. 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 on any element of the underlying complaint.

The Referee interpreted his role at the hearing on the motion to dissolve emergency suspension as being limited to determining whether Bar Counsel demonstrated "a likelihood of prevailing on the merits on any element of the

underlying complaint." In reaching this determination the Referee analogized this hearing as a "probable cause hearing" to determine whether there is probable cause that Respondent has violated any rules and if there is a finding of probable cause then the emergency suspension stays in place. TR 15, 20. The referee refused to consider any arguments that Respondent no longer "appears to be causing great public harm".

The problem with the facts of this case is that Rule 3-5.2(e)(2) states in part that, "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 on any element of the underlying complaint". The Referee took that language from the rule and interpreted it to mean the underlying petition for emergency suspension. TR 28. This is problematic because if we look exclusively at the likelihood of the Bar prevailing on any of the elements of the underlying petition for emergency suspension or complaint it sets up a threshold that no respondent is likely to meet. The Referee looked at Rule 3-5.2(e)(2) to the exclusion of any other components of the Rule, and in so doing refused to consider the issue of whether Respondent still "appears to be causing great public harm". If the Bar's and the Referee's position is correct then no Respondent would be able to meet this standard. The rule should not be read in such a restrictive

way that the very procedure it provides to challenge an emergency order is rendered meaningless because of an impossible standard. That cannot be the purpose of the rule. When the rule was amended this Court showed great concern to make sure that the rule met the requirement of due process and stated,

> …we agree with Mr. Trawick that affidavits should not become the 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 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***. The Florida Bar re Amendment to the Rules regulating The Florida Bar 1-3.7; 3-5.1(g); 3-5.2; 13-1.1 and Chapter 15, 593 So.2d 1035, 1036-37 (Fla. 1991). (Emphasis added).

In its efforts to insure due process of law it is clear this court was attempting to protect attorneys who were the subject of emergency suspension proceedings, however the language "likelihood of prevailing on the merits on any element of the underlying complaint" contained in Rule 3-5.2(e)(2) has crippled this effort. When the rule was amended this flaw was not detected. The court however can and should interpret this provision of the rule to be read in conjunction with Rule 3-5.2(a).

The standard that the Bar needs to demonstrate to the Court in order to have an attorney emergency suspended is to "establish clearly and convincingly that an attorney appears to be causing great public harm." *See*

Rule 3-5.2(a). The Referee in the instant case refused to consider Rule 3-5.2(a). Whether an attorney appears to be causing great public harm is therefore the "elements of the underlying petition" pursuant to Rule 3-5.2(e)(2). It is clear that this was the standard intended to be challenged on a motion for dissolution of emergency suspension and not "probable cause as to whether there is a rule violation". Respondent acknowledged that there were trust account irregularities in 2003, but was not permitted to demonstrate that these irregularities had been corrected and that now he is not "causing great public harm".

The Referee's interpretation of his role in this proceeding as that of making a determination of probable cause makes little sense in light of the fact that the issuance of an emergency suspension by the Court is in essence a substitute for probable cause. Rule 3-5.2(d) provides that the Bar must file a formal complaint within 60 days of the emergency order and proceed to trial of the underlying issues, without the necessity of a finding of probable cause by either a grievance committee or the Board of Governors.

Respondent should have been given the opportunity to present evidence that proves that the facts set forth in the Bar's petition for emergency suspension do not establish clearly and convincingly that Respondent is currently causing great public harm. Respondent should have

been allowed to present evidence that his trust accounts are currently in compliance with Rule 5-1.1 and that there is currently no emergency and that Respondent does not meet the threshold requirement for emergency suspension. Additionally, any allegations of misconduct should be addressed through the normal attorney disciplinary proceedings set forth in Rule 3-7.6. The referee expressed surprise at the restrictions of 3-5.2(e)(2) and stated,

> THE REFEREE: I mean, I'm surprised at the limitation of 3-5.2(e)(2) because in reading what I had read before in reviewing the materials, I was of the belief since the monies had been repaid and that the present dangerness issue had been resolved, it seemed to me that there was an argument to be made for a --I was looking forward to arguments that – there could be a strong argument made for supervision -- . . .
>
> MR. MULLIGAN: Your Honor, the only position –
>
> THE REFEREE: -- but I guess that's not what we're here for today.

TR 16-17.

The Referee should have entertained less restrictive alternatives short of suspension that would be in keeping with the stated purpose of lawyer discipline, such as depositing trust funds into a special trust account which can be monitored by the Bar or a monitor which requires approval from the Supreme Court or a referee appointed by the Supreme court before any disbursements are made.

CONCLUSION

Based upon the foregoing arguments and authority, this Court should reject the Referee's Report and Recommendation and dissolve the emergency suspension.

Respectfully submitted,

_____

RICHARD B. MARX
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing motion have been sent via Federal Express, overnight delivery to Thomas D. Hall, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy of the foregoing was sent and regular U.S. Mail to: William Mulligan, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, this____day of May, 2004.

_____

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COMPLIANCE WITH RULE 9.210(a)(2)

The undersigned hereby certifies that the foregoing Amended Initial Brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point proportionately spaced Times New Roman font and hereby files a 3.5” computer diskette containing said brief, which has been scanned and found to be free of viruses.

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