IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant.

Supreme Court
Case NO.: SC04-570

v.

LEONARDO JORGE GUERRA,

Respondent.

_____/

RESPONDENT'S REPLY 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 Trial Transcript will be referred to as "TT" followed by the referenced page number(s) (TT at_____)

The Florida Bar's Answer Brief will be referred to as "AB" followed by the referenced page number(s). (AB at ___).

SUMMARY OF THE ARGUMENT

The Referee interpreted the Supreme Court order of appointment (App. 058) as limiting the scope of the hearing to section 3-5.2 (e)(2) of the rule regarding emergency suspension and probation to the exclusion of the remainder of the of the rule. This conclusion is contrary to the spirit of the rule. If the Referee's analysis is correct then there is basically nothing for him to do at the hearing on the motion to dissolve since all the Bar has to do is demonstrate it can prevail on any element of the complaint. It can not be this Court's intention to limit the hearing on motion to dissolve to section (e) (2) of the rule. All sections of the rule must be read *pari material,* otherwise no one could dissolve an emergency suspension.

RESPONSE AND REBUTTAL TO ARGUMENTS PRESENTED IN ANSWER BRIEF

The Bar's position is that this court should approve the Report of Referee and leave Respondent's suspension in force without amendment in as much as it is consistent with the order of appointment of referee and Rule 3-5.2(e)(2) of the Rules Regulating The Florida Bar.

The Bar relies exclusively on the order of appointment of referee which provides that 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.058) Rule 3-5.2(e)(2) states 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 of any element of the underlying complaint." The Bar therefore concludes that the referee is limited to a strict construction of Rule 3-

5.2(e)(2). The Bar states that when a motion to dissolve emergency suspension is heard, it is irrelevant whether there has been repayment of misappropriated funds, the reasons underlying the misconduct or the fact that the underlying conduct has been corrected. The Bar argues that these are issues to be raised at a final hearing and not in a motion to dissolve emergency suspension.

By interpreting the order of appointment as limiting the consideration to Rule 3-5.2(e)(2) by itself the Referee restricted the scope of the hearing to to determining whether bar counsel demonstrated a "likelihood of prevailing on the merits of any element of the underlying complaint." By using such a limited scope and ignoring the remainder of the rule, there is basically nothing that the referee needs to do. Bar counsel can point to the affidavit attached to the petition for emergency suspension and the "likelihood of prevailing on the merits of any element of the underlying complaint" is established. With this limited analysis no emergency suspensions will ever be dissolved. This restricted analysis loses sight of the purpose of Rule 3-5.2 which is to impose emergency discipline, be it suspension or probation, when an attorney "appears to be causing great public harm" and those allegations of "great public harm" are unrebutted. It is logical therefore that the provisions of the rule allowing for dissolving an emergency suspension

should be considered in conjunction with arguments to rebut the court court's finding of "great public harm".

The Bar's factual allegations that it established Respondent was causing great public harm is not consistent with the record and the argument for the interpretation of the order of appointment as limiting the analysis to Rule 3-5.2(e)(2) is inconsistent with the rule as a whole.

The Bar points to the testimony of the Branch Auditor that Respondent engaged in a "ponzi scheme", "misappropriated funds from numerous clients throughout 2003", "used his trust account as if it was his personal bank account", and "borrowed in excess of $75,000 of family funds to cover shortages…" to conclude that Respondent was causing great public harm. AB at 4. This testimony does not establish that Respondent is "currently causing great public harm" or is still engaged in this type of behavior. The fact is that it was proferred that his trust account was currently properly maintained. The Referee's only finding was that the Bar established "a likelihood of prevailing on the merits of any element of the underlying complaint."

By interpreting the order of appointment to limiting the analysis to Rule 3-5.2(e)(2) the Referee refused to consider any evidence that Respondent repaid all monies due to clients, that he was now in full compliance with trust

accounting procedures as set forth in Rule 5-1.1, and that he no longer presented a danger to the public or to even consider less restrictive alternatives short of suspension. This cannot be the intent of this Court in as much as it is illogical for the rule to provide a procedure by which to dissolve an emergency suspension, but not allow the attorney to challenge the premise upon which the emergency suspension was obtained in the first place.

The Referee should have considered the first paragraph of Rule 3-5.2 (a) which provides, "On petition of The Florida Bar, authorized by its president, president elect, or executive director, supported by 1 or more affidavits demonstrating facts personally known to the affiants that, ***if unrebutted,*** would establish clearly and convincingly that an attorney appears to be causing great public harm." *See* Rule 3-5.2(a). (Emphasis added). The key words in this section are, "if unrebutted". The section of the rule for dissolving an emergency suspension must therefore be read *pari material* with the section dealing with rebutting the allegations of "great public harm", or else the entire rule would make no sense. According to the Bar's argument, an attorney can be suspended on an emergency basis and as long as the Bar can "demonstrate a likelihood of prevailing on the merits on any element of the underlying complaint" he stays suspended. If we follow this logic then once an emergency suspension is entered it cannot be

dissolved. At the hearing on motion to dissolve emergency suspension, the Referee denied Respondent the opportunity to present any evidence to rebut the allegations that he was "causing great public harm", and instead relied on the standard of a "likelihood of prevailing on the merits of any element of the underlying complaint." to affirm the emergency suspension.

Rule 3-5.2 contemplates emergency suspension to prevent an attorney from continuing to cause "great public harm". Additionally, the rule contemplates less restrictive alternative such as "an order imposing emergency conditions of probation." The Referee should have interpreted the order of appointment more broadly to include consideration of Rule 3-5.2 as a whole, and should have imposed a less restrictive alternative short of suspension in light of the fact that Respondent was no longer causing "great public harm."

CONCLUSION

Based upon the foregoing arguments and authority, the Referee's Report and Recommendation should be rejected and the emergency suspension should be dissolved.

Respectfully submitted,

_____

RICHARD B. MARX
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been sent via U.S. Mail 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 via 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 July, 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 reply brief, which has been scanned by Norton AntiVirus and found to be free of viruses.

_____

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