

**IN THE SUPREME COURT OF FLORIDA**  
(Before a Referee)

**THE FLORIDA BAR,**

Complainant,

vs.

**LISA KAREN BERG,**

Respondent.

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Supreme Court Case  
No. SC08-841

The Florida Bar File  
No. 2007-71,029 (11G)

**REPORT OF THE REFEREE**

I. **SUMMARY OF PROCEEDINGS**

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occur

On April 29, 2008, the Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings.

On May 27, 2008, the Respondent filed her Answer to the Complaint.

On June 10, 2008, the court conducted a Case Management Conference following which an Omnibus Scheduling Order was entered which established discovery deadlines and set the final hearing for October 20, 2008.

On October 20, 2009, a final hearing was held in this matter.

All of the pleadings, responses thereto, exhibits received in evidence and this Report constitute the Record in this case and are forwarded to the Supreme Court of Florida.

II. **FINDINGS OF FACT**

A. **Jurisdictional Statement.**

Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

## B. Summary of Allegations Against Respondent

The Florida Bar contends that the Respondent is in violation of Rule 3-4.3 (Misconduct and Minor Misconduct) of the Rules of Discipline; and Rules 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct) and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct by the following conduct:

On April 24, 2004, Respondent was selected as a member of the jury in the venire in the matter of *Maria Parajon v. Food Services Refrigeration, Inc., et al*, in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. The trial was a personal injury case arising from a traffic accident with injuries.

During voir dire, the panel members were asked whether anyone had been hurt, or under the care of a physician for personal injuries, whether or not a lawsuit had resulted from the injury. Respondent did not respond to this question. Counsel then asked if any panel member had been involved in any accidents. Again, Respondent failed to respond.

Counsel then asked a catch-all question of every panel member, asking if there was anything that he should know about them to help evaluate them as potential jurors in the case. Respondent's only response was to ask about the law firms that the lawyers in the case worked for.

Respondent was selected to serve on the jury and was ultimately chosen as the jury foreperson. The jury found in favor of the plaintiff against one defendant solely, finding no liability on the part of the remaining defendants, and awarding \$450,000.00 in damages.

Subsequently, plaintiff's counsel discovered that Respondent was involved in an automobile accident approximately three years prior to the accident in the instant case. Following her accident, Respondent was transported by ambulance to the hospital where she was treated for injuries sustained during the accident. Respondent was then placed under the care of an orthopedic surgeon for further treatment of these injuries. She hired an attorney to represent her in a personal injury claim. The claim was ultimately settled by her insurance company for \$4,000.00 plus payment of her medical bills and property damage. When asked if she had any

negative feelings about her settlement amount, Respondent replied, “Well, I think everyone always wants more money.”

Plaintiff’s counsel filed a motion for a new trial based, in part, on juror nondisclosure. After a hearing, the trial court denied the motion. The denial of the motion was appealed to the Third District Court of Appeal.

In a written opinion filed on March 28, 2007, the Third District Court of Appeal found that the trial court abused its discretion, and reversed and remanded the matter for a new trial based upon Respondent’s failure to disclose material information during voir dire.

After concluding that the undisclosed information was material to the underlying case, the Third District Court of Appeal found that Respondent concealed her personal litigation history. The Court found, “[S]he is a lawyer and an officer of the court. It is, therefore, difficult to imagine that she did not think the questions posed by [plaintiff’s] counsel applied to her.” The court specifically declined to make a credibility finding regarding whether or not the nondisclosure was intentional, holding that such a finding was irrelevant to the ultimate question.

According the Complaint, Respondent’s concealment of her personal injury litigation history was an obstruction of justice, wherein the verdict from a four day trial involving multiple parties was vacated as a result thereof.

### C. Narrative Summary of Case

The parties have stipulated to the introduction of the following exhibits which were received in evidence and reviewed and considered by the court:

1. 4/26/04 Excerpt of voir dire in *Parajon v. Food Service*
2. 5/06/06 Plaintiff’s Motion for New Trial, Renewed Motion for Directed Verdict, Additur and for Juror Interview
3. 5/21/04 Plaintiff’s Supplement to Motion for New Trial Due to Juror Nondisclosure
4. 9/28/04 Transcript of Proceedings in *Parajon v. Food Service*
5. 10/08/04 Order on Post-Trial Motions

6. 3/28/07 Third DCA Opinion
7. 10/10/07 Report by Herbert Parlato
8. 10/29/07 Respondent's Response to Parlato's Report
9. 4/13/07 Letter to Respondent from the Bar concerning the Daily Business Review article discussing the Third DCA opinion in *Parajon v. Food Service*

From those exhibits the following facts are established:

On April 26, 2004, jury selection in the case of *Parajon v. Food Service*, commenced. The plaintiff was seated on a bus bench on 152<sup>nd</sup> Avenue in the area of Southwest 72 Street when she was seriously injured as a result of an accident between two vehicles. She suffered comminuted fractures of her leg requiring several surgeries. The parties disputed which of the vehicles was at fault for the accident.

Judge Fredricka Smith was the presiding judge. Dennis Koltun and Scott Lazar represented the plaintiff in the trial; Pete Murphy represented defendants Food Service Refrigeration and Carlos Linares; Joel Bernstein represented defendant Diana Pereda.

The Respondent was a prospective juror on the venire and, in response to questioning from the court, indicated that she was an attorney who was a partner at the Stearns Weaver law firm. Plaintiff's attorney's first questions to the venire were directed to the Respondent. Dennis Koltun told her, "I don't mean to pick on Miss Berg, but if I told you, Miss Berg, that Gene Stearns and Bobby Weissler are good friends of mine. In fact, I play golf with one of them. Would that affect your ability to sit on this case?" The Respondent answered, "no."

Later, Koltun asked the panel as a whole:

Is there anybody sitting on this panel now that has ever been under the care of a physician for personal injuries, whether you had a lawsuit or not?

In other words, you may not have had any sort of lawsuit, but you slipped and fell, you got hurt, there is no claim brought, but you were under the care of a physician for personal injuries? Anybody?

The transcript does not reflect how many, if any, jurors raised their hands in response to that inquiry. After the question was posed, Koltun began questioning prospective jurors Sheldon Smith and Carmen Ramirez concerning injuries that they had sustained. At the conclusion of the

questioning of Ramirez, Koltun change topics and asked:

Is there anybody sitting on this panel other than – I know Miss Berg has special training in the law..... Anybody else that has special training either in law, medicine or engineering?

Does anybody sitting on the panel know what a traffic reconstruction expert is? Anybody ever heard that term, traffic reconstruction expert? You are shaking your head, Mr. Garcia.

At that point, Koltun questioned Garcia about his knowledge of traffic reconstruction.

Koltun asked if any jurors had had any surgeries and the Respondent volunteered that she had had a tonsillectomy and minor surgery on her foot. No follow-up questions were asked concerning her surgeries.

Other than his opening question, Koltun never addressed any questions directly to the Respondent.

At the conclusion of his questioning of the panel, Koltun asked the venire:

Has everybody that is sitting on the panel here right now heard all of my questions? Is there anybody sitting on the panel now that is thinking to themselves, you know, if this lawyer had only asked me this question, I would have told him something I think he should know in order to make an intelligent decision about whether I should be on this jury, on this panel, but he failed to ask the right question to get the right response from me?

Is there anything that I should have asked? Is there that you need to share with me that may help me in terms of my evaluation whether you would be a good juror for me in this case? Anybody in the back row think there is something they should tell me?

Anybody in the second row think there is something other than responses you have given that perhaps would help me in terms of my ability to evaluate you as a juror?

I know I have not talked to everybody. I have not talked to you two ladies, have I? I have not talked to you, have I?

Koltun then addressed Juror Snowden directly for two questions and re-addressed the venire:

Is there anyone in this row that feels if the proper question had been asked by me, and I just did not ask the right question, you have not given a response, maybe it would help me in terms of evaluating this case? Anybody? Yes.

At this point, the Respondent asked, “I need to know the law firm that both sides are with. I

do have law firms as clients. It has not been disclosed.” After the attorneys informed her of their law firm affiliations, the Respondent replied, “no problem.”

During the questioning by defense counsel Murphy, the Respondent was asked if she could follow the judge’s instructions as to the law with regard to damages and the amount of money to award the plaintiff. The Respondent indicated she would have no problems with that.

Respondent was also asked, “[i]s there anything else that you have heard so far in this case being a lawyer that would make it seem to you that maybe you could not, you know, serve as a juror in this case?” The Respondent answered, “no.”

Later, she was asked by Murphy if the fact that one of the drivers was making a u-turn alone would lead her to determine he must be at fault, she responded, “I don’t think it would make any difference.”

No other questions were asked directly to the Respondent or to the venire as a whole that are relevant to this matter.

During the exercise of challenges, the *defense* moved to excuse the Respondent for cause due to her bosses’ playing golf with plaintiff’s counsel. The challenge for cause was denied by the court.

During the exercise of peremptory challenges, the plaintiff and one defendant accepted Respondent as a juror and the remaining defendant’s attorney, Bernstein, again citing to Respondent’s bosses’ playing golf with the plaintiff’s counsel, exercised a peremptory challenge and excused the Respondent. When Bernstein was told that excusing the Respondent resulted in only five jurors left on the panel, Bernstein withdrew his challenge of Respondent and she served as the sixth and final juror on the jury. At the conclusion of the trial, the jury found only one of the two defendants liable and awarded the plaintiff \$450,000.00.

The plaintiff’s counsel, apparently while playing golf with the attorney who had represented the Respondent in her claim against State Farm, learned that Respondent had been injured in a car accident and had filed a claim against her insurer. She ultimately settled the matter. State Farm paid all her medical bills and property damage and gave her an additional \$4,000.00 for her back injury for which she had attended three weeks of physical therapy. Apparently, her attorney had told Koltun that the Respondent was not happy with the settlement of the claim.

The plaintiff then filed a motion for a new trial alleging, *inter alia*, that the Respondent had concealed material information during the jury selection process. Judge Smith conducted a juror

interview of the Respondent during which the Respondent testified that she had raised her hand in response to Koltun's question concerning injuries from an accident but that she was not called upon. Judge Smith did not accept or reject her explanation and found that the failure to provide the information was not material to her service as a juror and denied the motion for a new trial.

On appeal, the Third DCA reversed the trial court's order denying the motion for a new trial finding that the nondisclosure was material to her service as a juror. Significantly, the appellate court did not make any finding as to whether the nondisclosure was intentional.

In her response to the Bar's Complaint, the Respondent again emphasized that she had raised her hand in response to the question at issue but was not called upon. She also pointed out that she had no motive to conceal information from the attorneys so that she could serve on the jury. In fact, she had specifically told Judge Smith that she did not want to serve on the jury due to her other professional commitments.

As part of a Supplemental Stipulation, the parties have agreed that if Bernstein, Koltun and Lazar were called as witnesses during the final hearing, each would testify as follows:

**Joel Bernstein:** I have no current recollection of the voir dire. At the argument on the new trial motion, I stated that if I saw Ms. Berg raise her hand in response to Mr. Koltun's question about accidents, I would have asked her questions. I cannot testify that Ms. Berg did not raise her hand.

**Dennis Koltun:** I did not see Ms. Berg raise her hand in response to my question about accidents, but I cannot testify that she did not raise her hand in response to that question. If I had seen her raise her hand in response to that question, I would have questioned her about her accident and/or injuries.

**Scott Lazar:** I have no specific recollection of any answer that Ms. Berg gave or did not give during voir dire. I have no recollection one way or the other whether Ms. Berg raised her hand or not in response to Mr. Koltun's question about accidents.

The Bar did not present any live testimony. The Bar rested its case relying upon the stipulated exhibits and the Supplemental Stipulation.

Lisa Berg testified on her on behalf. Berg graduated from Cornell University and Emory Law School and was admitted to the Bar in 1992. She works as a labor and employment attorney for the Stearns Weaver law firm. She is an AV rated, Board Certified labor lawyer. She is actively involved in several community organizations. She has never been the subject of a prior Bar

complaint.

Berg testified that she told Judge Smith during the voir dire proceeding that she did not want to serve on the jury. She further testified that she honestly answered all questions directed to her individually and to the panel as a whole. She is certain that she did raise her hand in response to the question at issue but that Koltun, after following up the question with other jurors who had also raised their hands, did not ask her any followup questions. She also responded to the concluding question of Koltun which asked if there was any information that the attorneys would want to know and inquired of the attorneys in the trial the names of their firms to make sure none of the firms was a client of hers. She had no intent to deceive the attorneys during the voir dire.

### III. RECOMMENDATIONS AS TO GUILT

Attorney disciplinary proceedings call for the discharge of some of the court's most solemn and "highest duties." See *The Florida Bar v. Rayman*, 238 So.2d 594, 598 (Fla. 1970). When the Bar charges one of its members with misconduct, the court has a "continuing duty to require [that] charges...be supported by clear and convincing evidence" in order to shield "reputable members of the Bar" from prosecutorial overreach and the inevitable opprobrium associated with even the mildest forms of professional discipline. *Id.*

All of the allegations in the Bar's Complaint essentially charge the Respondent with dishonesty. Rule 3-4.3 of the Rules of Discipline provides that "[t]he commission by a lawyer of any act that is unlawful or contrary to honesty and justice... may constitute a cause for discipline." Rule of Professional Conduct 4-8.4(c) states that "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The Bar must prove that the Respondent's conduct was an intentional act of dishonesty or deception. See *The Florida Bar v. Burke*, 578 So.2d 1099, 1102 (Fla. 1991) ("Intent is a major and necessary element in a finding of guilt for dishonesty, fraud, deceit, or misrepresentation."); See also, *The Florida Bar v. Smith*, 866 So.2d 41, 46 (Fla. 2004)("[I]ntent must be shown to find a violation of Rule 4-8.4(c).").

The Bar has the burden of proving its allegations at a Bar disciplinary proceeding by "clear and convincing evidence." *The Florida Bar v. Cramer*, 63 So.2d 1069, 1070 (Fla. 1994) ("In order to find that an attorney has acted with dishonesty, misrepresentation, deceit, or fraud, the necessary

element of intent must be proven by clear and convincing evidence.”); *The Florida Bar v. Neu*, 597 So. 2d 266 (Fla. 1992) (same).

Florida courts have defined the “clear and convincing evidence” standard as follows:

[T]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

*Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4<sup>th</sup> DCA 1983); *See also, E.F. v. State*, 889 So.2d 135, 139 (Fla. 3d DCA 2004).

The Bar has failed to meet its burden of proof to establish any of the alleged violations. To the contrary, the court affirmatively finds that the Respondent testified truthfully during the final hearing and accepts her explanation for her conduct during the voir dire proceedings in the *Parajon* trial. The court finds that the Respondent was truthful during those voir dire proceedings and did not intentionally or negligently fail to disclose any information. The court also finds that the Respondent was honest in answering all of the questions of the attorneys and court during the post-trial hearing on the motion for a new trial.

Most significantly, the court accepts her testimony that she did raise her hand in response to the question concerning accidents and injuries but that the attorneys in the trial neglected to follow up and directly inquire of her. Because the prior accident in her mind was not important to her jury service she did not feel it was important to mention it during Koltun’s “catch-all” question. She had no intent to deceive the attorneys in that trial.

I recommend that Respondent be found not guilty of violating Rules Rule 3-4.3 (Misconduct and Minor Misconduct) of the Rules of Discipline (commission of an act that is unlawful or contrary to honesty and justice); and Rules 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct) and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct of the Florida Bar.

Each party shall be responsible for its own attorney’s fees and costs.

Done and Ordered this 21<sup>st</sup> day of October, 2008.

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ROBERT N. SCOLA, JR.  
Circuit Court Judge  
Referee  
73 W. Flagler Street, Room 1201  
Miami, Florida, 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32301, and that copies were mailed to the below listed counsel on the 21<sup>st</sup> day of October, 2008:

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ROBERT N. SCOLA, JR.  
Referee