

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case
No. SC97070

Complainant,

v.

JOHN EVRON KIRKPATRICK,

Respondent.

-----/

ON PETITION FOR REVIEW

ANSWER BRIEF OF THE FLORIDA BAR

RANDI KLAYMAN LAZARUS
Bar Counsel - TFB #360929
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN ANTHONY BOGGS
Staff Counsel - TFB #253847
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR.
Executive Director - TFB #123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

(850) 561-5600

TABLE OF CONTENTS

| | <u>PAGE</u> |
|--|--------------------|
| Table of Contents | i |
| Table of Authorities | ii, iii |
| Statement of the Case and of the Facts | 1-8 |
| Summary of Argument | 9-12 |
| Issues on Appeal | 13 |
| Argument | 14-42 |

I.

THE RESPONDENT FAILED TO MEET HIS BURDEN OF PROVING A LACK OF COMPETENT SUBSTANTIAL EVIDENCE REGARDING THE REFEREE’S FACTUAL FINDINGS

II.

THE RESPONDENT HAS ESTABLISHED NO DUE PROCESS VIOLATION REGARDING THE REFEREE’S CONCLUSION THAT RESPONDENT LIED TO MCPHERSON ON SEPTEMBER 17, 1996

III.

THE REFEREE DID NOT ERR BY DECLINING TO RECUSE HERSELF

| | |
|--|----|
| Conclusion..... | 43 |
| Certificate of Service | 44 |
| Certificate of Type, Size, Style and Anti-Virus Scan | 44 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|--|---------------|
| <u>Fontainebleau Hotel Corp. v. Walters</u> , 246 So. 2d 563 (Fla. 1971) conformed to 248 So. 2d 681, mandate conformed to 253 So. 2d 881 | 39 |
| <u>Roach v. CSX Transportation</u> , 598 So. 2d 246 (Fla. 1st DCA. 1999) | 16, 17, 22 |
| <u>School Board of Broward County v. Beharrie</u> , 695 So. 2d 437 (Fla. 4th DCA 1997) | 15 |
| <u>Suarez v. State of Florida</u> , 115 So. 519 (Fla. 1928) | 42 |
| <u>The Florida Bar v. Brake</u> , 767 So. 2d 1163 (Fla. 2000) | 37 |
| <u>The Florida Bar v. Della Donna</u> , 583 So. 2d 307 (Fla. 1991) | 37 |
| <u>The Florida Bar v. Fredericks</u> , 731 So. 2d 1249 (Fla. 1999) | 14 |
| <u>The Florida Bar v. Sweeney</u> , 730 So. 2d 1269 (Fla. 1998) | 14 |
| <u>The Florida Bar v. Vernell</u> , 721 So. 2d 705 (Fla. 1998) | 11, 39 |
| <u>The Florida Bar v. Wilson</u> , 599 So. 2d 100 (Fla. 1992) | 14 |

Williams v. Guyton,
167 So. 2d 7 (Fla. 3rd DCA 1964) 40

OTHER AUTHORITIES:

Rules Regulating The Florida Bar:

Rule(s)3-7.6(1)(2) 42

 3-7.6(e) 15

 4-8.4(c) 1, 7, 8, 9, 10, 39

 4-8.4 (d) 1, 7, 8, 9, 10, 11,
37, 39

Florida Rules of Civil Procedure

1.020 40

1.110(b)(f)(g) 39

1.120 40

Florida Jurisprudence Second

3 Fla. Jur 2d "Appellate Review" §296 28

STATEMENT OF THE CASE AND OF THE FACTS

This Court will note that the respondent has submitted a one-sided highly argumentative presentation of the Case and Facts. First, in his Statement of the Case, the respondent attempts to characterize the complaint filed in this case heard by the referee as limited to one violation of the Rules, namely a misrepresentation to Judge Andrews. That assertion (pg. 1, Respondent's Brief) is incorrect.

In addition to the allegations of misrepresentation to Judge Andrews, paragraph 21-24 of the complaint alleges that on September 17, 1996, respondent made a false promise to deliver \$7,000.00 which was overdue in order to obtain cancellation of a scheduled court hearing.

Paragraphs 29-31 alleged that on two additional occasions respondent took action to delay or cancel hearings. One was a motion for continuance filed on April 29, 1998, one day before a scheduled trial. The other was a bankruptcy filing which was submitted on the same day (June 18, 1998) as a scheduled trial.

Paragraph 32 of the complaint alleged that the preceding allegations constituted violations of Rule 4-8.4(c) (conduct involving dishonesty fraud, deceit or misrepresentation) and 4-8.4(d) (conduct prejudicial to the administration of justice).

The factual background is set forth in the findings of the referee.

Respondent does not disagree with those findings which follow (1-8).

1. JAMES HOWARD and KEY FINANCIAL, the Defendants in a civil law suit filed in the Circuit Court of Pinellas County under Case No. 92-4968 CI-011, were originally represented by the Respondent's law partner, RICHARD WILLIAMS.
2. Due to MR. WILLIAMS' illness, the Respondent assumed responsibility over much of MR. WILLIAMS' caseload, including the above case.
3. The Respondent represented MR. HOWARD and KEY FINANCIAL at the mediation hearing held on May 29, 1996. At the time, the parties entered into a stipulated agreement whereby the Defendants would pay \$7,000.00 on or about July 1, 1996 and \$1,000.00 each month thereafter from August 1996 to May 1997, for a total of \$17,000.00.
4. A handwritten "Stipulation of the Parties" was signed by both MR. McPHERSON and the Respondent on behalf of their respective clients on May 29, 1996. [Bar Exh. #3].
5. The Stipulation was presented to JUDGE HELEN HANSELL, who requested that it be typed and re-submitted to her [Tr. pg.47: testimony of JACK McPHERSON; and Bar Exh. #4: May 30, 1996 letter from MR. McPHERSON to Respondent].
6. MR. McPHERSON prepared the typed Stipulated Agreement and sent it to the Respondent for his signature.]see Bar Exh. #4: letter from MR. McPHERSON to Respondent; and T. p. 47-48: testimony of JACK McPHERSON].
7. In this May 30, 1996 letter, MR. McPHERSON specifically stated that he believed this Stipulation conformed with their agreement and that unless there was some revision the

Respondent cared to make, he should sign it and sent it to JUDGE HANSELL with a copy to him.

8. On June 14, 1996, when MR. McPHERSON did not receive a copy of the signed Stipulation, he wrote the Respondent to inquire where it was and to remind the Respondent that the initial payment was due on July 1, 1996. [see: Bar Exh. #14 and testimony of MR. McPHERSON, T. p. 50].

In regard to these and other findings, the respondent's citation of the facts includes only those facts which could tend to support the defense. Respondent ignores the extensive testimony and documentary evidence which establishes that respondent's failure to deliver the \$7,000.00 had nothing to do with the alleged absence of a stipulation. There was extensive testimony and documentary evidence which supported the Bar's position that the stipulation was not material to respondent's conduct.

Attorney McPherson had sent a signed stipulation to respondent on May 30, 1996 (Tr. 47-48). Yet respondent had testified that the source of difficulty was that his client was demanding a signed stipulation. (Tr. 162-164). In fact, his client, James Howard, indicated his clear intention to pay the \$7,000.00 without any preconditions in a letter to the respondent dated June 25, 1996. (The Florida Bar Exh. 1A). Howard stated that he had not received any communication from respondent regarding the \$7,000.00 which was part of the mediation settlement. He

did not ask for a signed stipulation before sending the check. In fact, he asked where the \$7,000.00 should be sent. (The Florida Bar Exh. 1A). Howard wrote again on July 8. (The Florida Bar Exh. 1B). He did not ask about the stipulation. He noted that the \$7,000.00 had been scheduled for delivery on July 1 and enclosed a check for that amount. He added that he still had not heard from the respondent and expressed his frustration.

On September 17, 1996, Howard sent another check to respondent. He was providing a replacement check because respondent had advised him that the first check was torn. (The Florida Bar Exh. 1C). Howard did not ask for an executed agreement. He supplied the check and instructed respondent to "please apply this to the account as agreed." Respondent told McPherson, counsel for the opposing party, that he had the \$7,000.00 in his possession and would send it by overnight mail. (Tr. 73,74). However, Howard testified that he didn't put the check in the mail to Kirkpatrick until the same day, September 17. (Howard depo. pg. 13). McPherson did receive a letter from respondent. Respondent explained the existence of the letter (Tr. 148) without a check enclosed, by claiming that a copy had been faxed as well. A September 18, 1996 trial date pertaining to the undelivered check was cancelled based upon respondent's representation. (Tr. 78).

McPherson, like Howard, had minimal success in his effort to obtain responses from the respondent. Based upon his secretary's conversation with respondent (Tr. 57,58) McPherson wrote to respondent on July 26, 1996 (The Florida Bar Exh. 7). He stated, in part, that: "I understand you have funds in your trust account." He also stated that he did not understand why respondent was holding the funds in his trust account and why he had not returned the executed stipulation.

McPherson, like Howard, was greeted with silence. (Tr. 71). Therefore, he wrote another letter on August 23, 1996 (The Florida Bar Exh. 9). He expressed his continued belief that \$7,000.00 was being held in trust. (Tr. 72). He stated, in part:

"I am somewhat perplexed about this entire matter for the reason that several weeks ago, you telephoned the office to advise that you did have the initial deposit of \$7,000.00 in your trust account but as of now, there has been no disbursement."

McPherson also enclosed a Notice of Hearing on a motion to rescind the agreement, which had been set for September 18, 1996.

Respondent did not respond to McPherson's letter until September 17, 1996, one day before the scheduled hearing. (Tr.73-74). Respondent called McPherson on that date and told him that he had the "money or checks", and

requested cancellation of the hearing. (Tr. 72-74). For the first time the issue of the stipulation was mentioned, namely in a subsequent memorandum letter sent by the respondent. (The Florida Bar Exh. 2). Even in that self serving letter, respondent promised to send the check, even though he claimed that he had been waiting for a new signed stipulation. (The Florida Bar Exh. 10). McPherson mailed a new signed stipulation (Tr. 76). Only the attorneys were supposed to sign the agreement. (Tr. 48). Nevertheless, McPherson received neither the promised "checks" nor an explanation. When respondent was called as a witness by the Bar, he testified that The Florida Bar's Exh. 2, was a letter he wrote on September 17, 1996 which memorialized the sending of checks to McPherson. (Tr. 144-145). The letter, however, said "I will be sending you the checks overnight..." (Tr. 146). No checks, however, were received by McPherson. (Tr. 76) who did receive the letter. (The Florida Bar Exh. 2). There was no reference to an enclosure on the letter. (Tr. 147).

Respondent's recitation of the factual record also presents a limited, one sided argumentative summary of the role of Richard Williams, respondent's partner. This is directly inconsistent with the referee's finding #2 which was accepted by respondent in his brief that respondent took over this case. He includes the statement of Howard that he initially hired Williams. Respondent states

that "at some point" Williams advised Howard that respondent would take over the case. (Respondent's Brief, pg. 9). Respondent fails to include the facts that Williams was seriously ill, and in a "weakened state" (Tr. 171) that respondent took over the case at the time of the mediation (Tr. 176); that the documentary evidence contained only one from Williams (The Florida Bar Exh. 5) and that the correspondence on record was almost exclusively about, to or from the respondent. (The Florida Bar Exhs. 1A, 1B, 1C, 4, 5, 6, 7, 8, 9, 10). Also, Howard said that respondent was handling his case. (Deposition pg. 15).

Pursuant to pleadings filed by the McPherson firm an order was entered on November 5, 1996, which found that respondent had misrepresented his intention to forward the check(s) on September 17. (Tr. 78). Based upon respondent's failure to deliver any funds, a civil suit was filed.

Trial was scheduled for April 30, 1998. However, on April 29, respondent filed an emergency motion for continuance based upon a claimed conflict.

The trial was rescheduled for June 18, 1998. Respondent filed for bankruptcy on the morning of June 18, 1998, thereby staying the rescheduled trial. McPherson received notice of the filing prior to that date. (Tr. 88-89).

The referee found that respondent was guilty of the following violations:

- A. The representation by the Respondent to JACK McPHERSON

on September 17, 1996 that he was holding "checks" issued by his client, JAMES HOWARD, and that he would send them by overnight mail to MR. McPHERSON were false, in violation of Rule 4-8.4(c) and 4-8.4(d) of the Rules of Professional Conduct, based upon the following:

● ● ●

- B. The representations by the Respondent to JUDGE HORACE ANDREWS. Circuit Court Judge of the Sixth Judicial Circuit in and for Pinellas County, Florida, that the Respondent was under the impression that his client MR. HOWARD's check had been mailed to MR. McPHERSON and, if not received, had either been lost in the mail or still in the Respondent's possession and that he would look for it, were false in violation of Rule 4-8.4(c) and 4-8.4(d) of the Rules of Professional Conduct, based upon the following:

● ● ●

- C. This Referee finds that the Respondent failed to timely notify opposing counsel and the Court of his unavailability for trial on April 30, 1998 in violation of Rule 4-8.4(d), engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice, of the Rules of Professional Conduct, based upon the following:

● ● ●

- E. This Referee finds that the Respondent violated Rule 4-8.4(d), engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice, of the Rules of Professional Conduct by filing for bankruptcy on the morning of June 18, 1998 when such conduct necessitated a stay of the trial in which the Respondent was a named Defendant and which was specially re-set for the afternoon of June 18, 1998 upon the Emergency Motion for Continuance the day before the

initial trial setting, based upon the following:



SUMMARY OF THE ARGUMENT

There is clearly substantial competent evidence to support the referee's findings. The first finding was:

- A. The representation by the Respondent to JACK McPherson on September 17, 1996 that he was holding "checks" issued by his client, JAMES HOWARD, and that he would send them by overnight mail to MR. McPHERSON were false, in violation of Rule 4-8.4(c) and 4-8.4(d) of the Rules of Professional Conduct, based upon the following:

(subheadings omitted)

Pursuant to a mediation agreement \$7,000.00 was to be mailed to McPherson who was the attorney opposing the respondent's client. No evidence was offered to dispute that fact. Evidence in the record proved that McPherson wrote several letters to respondent when that payment was overdue. Respondent's client, James Howard, also wrote several letters and sent him a check for \$7,000.00. McPherson testified that respondent did not respond until September 17, 1996. Howard

testified that he called respondent on either the 16th or 17th to find out what was happening.

A letter dated September 17, 1996 was offered into evidence. Howard confirmed that he mailed the check with that letter on September 17. McPherson stated that respondent promised him that he was in possession of the funds in the September 17, conversation and would send it by overnight mail. On the basis of his representations, it is undisputed that McPherson agreed to cancel a September 18, 1996 hearing in which he was seeking rescission of the settlement agreement. Also, undisputed is that the check was never received and no payment has been sent to McPherson's clients to date. A letter was received by McPherson without the check.

Respondent offers the defense that he did send the check. He offered as a witness the mother of his child who claimed to have worked at his office temporarily. Her testimony was equivocal and contradicted the respondent in some respects. Respondent was not credible insofar as he could not have mailed a check that he didn't have and his client's affirmation of letters in evidence contradicted an alleged defense for the delay.

Respondent takes issue with virtually every finding of the referee. Those arguments and the Bar's response are too numerous to include in this summary.

Finding B pertained to a representation to Judge Horace Andrews of Pasco County in response to a Motion to Compel Payment. Respondent represented that he mailed the check, and if it was not received, it was lost or still in his possession, and he would look for it. These representations were found to be false and in violation of Rules 4-8.4(c) and (d).

Again there is ample evidence to support the conclusion. Again, it is impossible for respondent to mail a check that he didn't have. Additional evidence will be included in the Argument portion of this brief.

Respondent indulged in a similar pattern of last minute delay in April 29, 1998 and June 18, 1998. It is undisputed that respondent notified McPherson one day before an April 30, 1998 trial regarding this same subject matter that he had a conflict. The referee utilized a calendar to determine that respondent could have notified McPherson five (5) days earlier. She concluded that the failure to do so was conduct contrary to the administration of justice, Rule 4-8.4(d). Again, the number of arguments set forth by respondent defies summarization herein.

Respondent obtained another last minute delay by filing for Bankruptcy on the morning of the rescheduled trial. McPherson testified that he received no notice prior to the day of the rescheduled trial.

The third issue claims a denial of due process due to findings which were not

pled. The findings, however, are consistent with the pleadings. The rule in The Florida Bar v. Vernell, 721 So. 2d 705 (Fla. 1998) does not apply because in Vernell the referee considered matters which arose during the course of the proceedings.

Respondent's third issue on appeal advances the claim that the referee should have recused herself. There was no basis for recusal. The referee considered documents provided to the Bar in discovery which were filed with the referee. The applicable rules permit it. The referee had no way of knowing in advance whether the documents would favor the Bar or the respondent.

ISSUES ON APPEAL

I.

**WHETHER THE RESPONDENT FAILED TO MEET HIS
BURDEN OF PROVING A LACK OF COMPETENT
SUBSTANTIAL EVIDENCE REGARDING THE REFEREE'S
FACTUAL FINDINGS**

II.

**WHETHER THE RESPONDENT HAS ESTABLISHED
NO DUE PROCESS VIOLATION REGARDING THE
REFEREE'S CONCLUSION THAT RESPONDENT LIED
TO MCPHERSON ON SEPTEMBER 17, 1996**

III.

**WHETHER THE REFEREE DID NOT ERR BY
DECLINING TO RECUSE HERSELF**

ARGUMENT

I.

THE RESPONDENT FAILED TO MEET HIS BURDEN OF PROVING A LACK OF COMPETENT SUBSTANTIAL EVIDENCE REGARDING THE REFEREE'S FACTUAL FINDINGS

Respondent recognizes that a referee's findings of fact are presumed to be correct and will be upheld on appeal unless they are clearly erroneous or lack evidentiary support. The Florida Bar v. Wilson, 599 So. 2d 100 (Fla. 1992).

Likewise, respondent recognizes the principle that the party seeking reversal must show that there is no evidence in the record to support the conclusions. The Florida Bar v. Sweeney, 730 So. 2d 1269 (Fla. 1998).

Respondent's argument is predicated to a large degree upon an incomplete analysis of the role of circumstantial evidence. Respondent ignores his own recitation of authority which holds that when one relies upon circumstantial

evidence alone, that party must prove that the evidence is inconsistent with every reasonable hypothesis of innocence. The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999). The initial defect in respondent's argument is that he has failed to establish that the Bar is relying upon circumstantial evidence alone.

A review of the trial transcripts reveals that the major portion of the Bar's case is based upon direct evidence and not circumstantial evidence. The distinction is set forth in 23 Fla. Jur. 2d, Evidence and Witnesses, 139.

The distinction between direct and circumstantial evidence is that direct evidence is given by witnesses who testified directly of their own knowledge, whereas circumstantial evidence is evidence of facts from which the existence of other facts may be inferred. Circumstantial evidence includes all evidence of an indirect nature, whether the inferences afforded by it are drawn from prior experience, are deduced from the circumstances of the particular case, or arise from reason aided by experience.

It is apparent from the facts in this case that the major portion of the Bar's case is based upon direct evidence, i.e., the testimony of witnesses directly from their own knowledge. The referee noted the implications of some of the direct evidence in the form of testimony and correspondence.

On page 19 of his brief, respondent asserts that inferences based upon inferences are invalid. He cites School Board of Broward County v. Beharrie, 695

So. 2d 437, 438 (Fla. 4th DCA 1997) which states:

In recent years we have several times undertaken a discussion of the rules applicable to circumstantial evidence and justifiable inferences therefrom in civil actions, as distinguished from criminal cases....The sum of all of these opinions is that in a civil case¹, a fact may be established by circumstantial evidence as effectively and as conclusively as it may be proved by direct positive evidence. The limitation on the rule simply is that if a party to a civil action depends upon the inferences to be drawn from circumstantial evidence as proof of one fact, it cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences.

(Emphasis supplied)

Respondent has designated few inferences based on inferences which were based upon circumstantial evidence. Furthermore, respondent fails to apprise us of whether any conclusion of that nature is crucial to the Bar's position.

Respondent also argues that uncontradicted testimony must be accepted by the trier of fact. However, the applicable law is quite different. In Roach v. CSX Transportation, 598 So. 2d 246 (Fla. 1st DCA. 1999) the Court stated:

We are duty bound not to disturb the findings of fact of a trial judge in a case heard without a jury where such findings are based upon conflicting competent evidence.

¹ The Bar recognizes that Rule 3-7.6(e) defines Bar proceedings as quasi-judicial administration proceedings.

However, where the testimony on the pivotal issues of fact is not contradicted or impeached in any respect, and no conflicting evidence is introduced, these statements of fact can not be wholly disregarded or accepted as proof of the issue for which it is tendered, even though given by an interested party, so long as it consists of fact, as distinguished from opinion and is not essentially illegal, inherently improbable or unreasonable, contrary to natural laws opposed to common knowledge, or contradictory within itself. Roach v. CSX Transportation, Inc., 598 So. 2d 246, 249 (Fla. 1st DCA. 1999).

(Emphasis supplied)

Respondent's assertion cannot be sustained. The evidence, both direct and circumstantial cited above, and additional evidence which follows, clearly establishes that there was substantial competent evidence to support the referee's findings.

Respondent and opposing counsel, Jack McPherson, arrived at a settlement agreement as a result of mediation on May 29, 1996. (Tr. 43-44). James Howard, respondent's client was to pay \$7,000.00 dollars to McPherson's clients by July 1, 1996 and \$1,000.00 per month thereafter until \$17,000.00 was paid. (Tr. 46).

A stipulation agreement was drafted to be signed by the attorneys. (Tr. 48, The Florida Bar Exh. 4). There was no place for signatures of the parties. (Tr. 48, The Florida Bar Exh. 4). McPherson wrote to respondent on May 30, enclosed the typed version of the agreement requested by Judge Helen Hansell, and asked

respondent to sign and return it to the Judge. (Referee's Finding #7, not disputed by respondent).

On June 14, 1996, McPherson, who had not received a copy of the signed stipulation, wrote to respondent and reminded him of the July 1, 1996 deadline for payment in addition to inquiring about the stipulation (Tr. 50, Exh. 14).

No payment was made by July 1, causing McPherson to file a motion to rescind the settlement (Tr. 58). On July 11, 1996, he wrote to respondent and enclosed a copy of the motion to rescind. (Tr.56). McPherson's secretary, Michelle Culligan, called respondent's office to schedule a hearing date. (Tr. 58, 59). That call led McPherson to write to respondent again, on July 26. (Tr. 67).

He read aloud that he wrote:

"I understand that you have Mr. Howard's initial payment in your trust account and that you are awaiting an acknowledgment from me that an appropriate receipt will be provided as soon as the \$7,000.00 is paid into my trust account."

"I will be very pleased to provide you with a letter acknowledging receipt of the \$7,000.00 disbursing it. However, I cannot execute, nor can my clients execute, a release or stipulation for dismissal until the remaining \$10,000.00 is paid as required by the mediation agreement which we reached in St. Petersburg quite some time ago. At that time, I did transmit a joint stipulation for your signature which had been requested by Judge --" it says Hanson. I think it's supposed to be Hansel -- "by

Judge Hanson (sic), but which has not yet been returned to me."

(Tr. 68-69; Exh. 7)

McPherson received no answer from respondent (Tr.69) and never was advised that he was not holding the \$7,000.00 in his trust account. (Tr.69).

McPherson sent another letter on August 5, 1996 (The Florida Bar Exh. 8).

The following portion was read into the record.

"I understand that you have the first \$7,000.00 in your trust account which remains undisbursed and by this time, you should have the \$1,000.00 payment for August on deposit as well. My clients cannot understand why you are retaining their monies in you trust account by not disbursing the same pursuant to the settlement agreement. Also, I cannot understand why you have not returned the executed stipulation which was requested by Judge Hanson at the time we reached a settlement. I sent that stipulation to you on May 30th, 1996 and it has not yet been returned. At this point, my clients are inquiring of the responsibility of an attorney under the rules of the Florida Bar who holds money in a trust account which should be disbursed to them pursuant to an agreement. I am assuring them that the preferable course of action is for us to work it out if at all possible, but quite frankly, I am afraid my client's patient [sic] has become exhausted."

(Tr. 70, line 5 through Tr. 71, line 3)

McPherson received no reply (Tr.71) and wrote again on August 23 (The Florida Bar Exh. 9). McPherson indicated again that he understood that the \$7,000.00 was in respondent's trust account based upon respondent's telephonic representation to McPherson's office in which that information was provided (The

Florida Bar Exh. 9) The letter specifically referred to McPherson's understanding that the funds were being held in respondent's trust account (Tr. 72).

On the basis of respondent's total failure to reply to any of the correspondence from McPherson, McPherson set his motion to rescind for hearing on September 18, 1996. That Notice of Hearing finally produced some communication from respondent. Respondent called McPherson, said he had the funds, and requested cancellation of the hearing. (Tr. 73-74). The telephone call was received on September 17, 1996, one day before the hearing. (Tr. 73). Respondent said he would forward the funds (Tr.74). McPherson agreed to cancel the hearing and memorialized their conversation in writing. (The Florida Bar Exh. 10).

In that letter McPherson advised that he was forwarding a new stipulation, the same form which he had sent to respondent on May 30, 1996 (Tr.76). No funds were received by McPherson and no explanation for the failure to send the funds. (Tr.76). McPherson did, however, receive a letter from respondent without any funds. (The Florida Bar Exh. 2, Tr. 76)

A hearing was, therefore, scheduled before Judge Andrews on a previously filed motion to rescind or, alternatively, entry of a judgment (Tr.77) and a subsequent Motion to Compel Payment. (Tr.77).

An order was entered on November 5, 1996 (The Florida Bar Exh. 11). The order stated that based upon respondent's representations the September 18, 1996 hearing had been canceled, that the funds were not mailed as represented, and no payments had been received by Jack McPherson, despite repeated efforts by McPherson. A final judgment for the amount of indebtedness pursuant to the agreement (\$17,000.00) was entered by the court. (Tr.80). The Court did not require a signed and typed stipulation agreement. (Tr. 80).

The order of November 21, 2000 also found that respondent's claim at the hearing (by telephone) that he believed the \$7,000.00 check had been mailed to plaintiffs counsel, but if not received that it was either lost or in the respondent's possession, was false. (Tr.81). The judge also found that respondent's promise to search for the check and forward it as partial payment was false. (Tr.82).

McPherson never received any funds. (Tr.82).

McPherson filed suit against respondent and respondent's clients in order to obtain funds pursuant to the judgment. When the trial was set, respondent waited until April 29, 1998, one day before the April 30 trial date to file an emergency motion for a continuance claiming a conflict. (Tr.87). Trial was reset for June 18, 1998 at 1:30 p.m. (Tr.87). On that morning respondent filed a petition for bankruptcy, and notified McPherson and the Court of the automatic stay that went

into effect. (Tr.88).

Even if the Bar's case relied solely upon circumstantial evidence, there was sufficient evidence to exclude every reasonable hypothesis. Respondent engaged in a clear and consistent pattern of delay and deception. The constant seeking of continuances and failure to abide by his promises cannot be reasonably explained as mere coincidence.

Furthermore, it is readily apparent that respondent's position is contradictory within itself. He seems² to offer several explanations:

1. He decided that the check or checks would not be sent because his client insisted upon a stipulation signed by all the parties. (Tr. 162, 165-166).
2. He decided that the check or checks should be sent even though his client had insisted upon a stipulation signed by all the parties. (Tr. 146).
3. His intention to send the check was clear. (Respondent's brief, pg. 23,36).
4. Richard Williams had control of the case, not him. (Tr. 155).

These lines of defense are logically inconsistent and the testimony of the respondent is also "inherently improbable or unreasonable". Roach, supra. It is

² Respondent frequently raises arguments without stating any logical conclusion. For example, he argues that it was Williams' case. Does that mean that Williams was somehow at fault for the non-delivery of the checks? Respondent accepted the referee's finding #2, that respondent took over the case from Williams.

clear from the testimony and the referee's finding that the respondent was not credible.

Respondent lacks credibility because he was contradicted and/or impeached. He and his only witness contradicted each other. He asserted that his client had requested a sworn stipulation before forwarding the check (ultimately alleged to be torn). His client, James Howard did not request the stipulation. His letters included no such request. (The Florida Bar Exhs. 1A, B, C).

Kirkpatrick told Howard (Depo., pg. 18) that the first check was destroyed because it was torn. Yasmin Cantera, his own witness, testified that: "We sent the first check back to the client." (Tr. 206). She identified the employee who mailed it. (Tr. 220).

Respondent also testified that he discovered the ripped check on September 17, 1996 and called Howard. (Tr.265). He remembered that he asked Yazmin to get him on the phone. Howard testified that (although most of his attempts to reach respondent were futile), he initiated the September call and he did talk to respondent (Howard's depo., pg. 10). Kirkpatrick claimed in his conversation with McPherson that he was in possession of a check on September 17, 1996, which wasn't mailed to him until that same day, September 17 (Howard's depo., pg.13).

Respondent's explanation of that September 17, 1996, conversation is

unreasonable, improbable and contradictory. If it was his legal position that a stipulation had to signed by everyone involved before the funds should be paid, why did he request a new check from Howard and allegedly convince Howard to mail it without the signed stipulation? Why didn't he attend the scheduled hearing on the motion to rescind on September 18, 1996 and offer his defense to the Court that a signed stipulation was lacking? What was the point of sending the funds to McPherson to hold, if a required signed stipulation had not been furnished, as he alleged?

Or, if Williams was in control of the case as respondent alleged, why didn't he advise Howard, or McPherson in his September 17, 1996 telephone call that the matter of the check had to be resolved by Williams? Why didn't he advise the Court of the fact, when he was confronted with a Rule to Show Cause, prior to the issuance of the November 5 order?³

If Williams was in control of the transfer of the \$7,000.00, why didn't respondent tell Howard in response to his many letters or McPherson in response to his letters? Why is it that no written indication of the request for an executed stipulation appears until September, in an after-the-fact, self serving memorandum,

³ An order of contempt was not entered. However, the Court did not have the benefit of Howard's letters or testimony.

drafted by respondent, after a conversation with McPherson?

The referee justifiably found that the testimony of the respondent was not credible in many respects, and was frequently contradicted by other evidence, or his own testimony. His credibility may well have been questioned because his counsel gave him hand signals. (Tr. 161). The Referee's Report, paragraphs 37, 38, 40, 41, 42A-D, deals with those aspects of respondent's testimony which were most clearly contradicted, impeached or self contradictory. Among the factors pointed out by the referee was that the first of client Howard's letters to respondent (The Florida Bar Exh. 1A) did not ask respondent for additional documentation before sending a check as respondent had contended. Howard simply asked who to send the money to because he knew that it was due.

The letter of July 8 (The Florida Bar Exh. 1B) reports Howard's concern about the July 1, 1997 deadline for delivering \$7,000.00, which had passed. He added that he had heard nothing from respondent. He did not mention a signed stipulation.

In a subsequent letter (The Florida Bar Exh. 1C) dated September 17, 1996, Howard enclosed a second check based upon respondent's claim that somehow the first check was torn. Howard did not, as respondent claimed, ask for an executed agreement. Howard merely said "please apply this to the account as

agreed."

Also, as stated above, respondent falsely advised McPherson on September 17, 1996, that he had the \$7,000.00 dollar check and would send it. He obtained a cancellation of the hearing with that promise. (Tr. 73, 74). He could not have had the check because it wasn't mailed to respondent until that same date. (Howard deposition pg. 13). That false representation led to a cancellation of the previously scheduled September 18, 1996 hearing. (Tr. 73).

Respondent offered only one witness in support of his position. He did not subpoena his former partner, Richard Williams, or seek the file allegedly in William's possession which would have contained any documents proving alleged overnight mailings. However, he did produce as a witness, Yazmin Cantera.

Cantera is the mother of respondent's child. (Tr. 209). She stated that she worked for respondent from March of 1996 through January of 1997, "just helping in the office." (Tr. 202). She somehow recalled that four years earlier she sent the \$7,000.00 check to McPherson and paid \$2.90 to mail it (the replacement check). The original check which she stated was torn, was the only check that was kept in a file during the time that she worked in the office. (Tr. 218-219). The original check had supposedly been returned to client Howard by Rima Dalal, respondent's secretary-receptionist. (Tr. 220). Respondent said that the check was destroyed.

Rima did not appear at the trial.

Cantera's lack of credibility is reflected in the following questions and incredible answers:

BY MS. LAZARUS:

Q. Would it be a disadvantage to you from a financial standpoint if Mr. Kirkpatrick's privilege to practice law was hampered in some way?

A. Not really.

Q. It wouldn't hurt child support?

A. It doesn't make a difference to me.

Q. So it wouldn't matter to you if he stopped sending you child support?

A. No.

(Tr. 237-238)

Her credibility was also undermined by giving a variety of answers as to who mailed the check. (Tr. 229 ff.)

Respondent seeks to bolster the credibility of the testimony in his behalf by attacking the referee's reasoning in regard to virtually every finding. However, the specific reasoning of the referee is inconsequential as long as the result is correct. The innumerable cases supporting this principle are summed up in 3 Fla. Jur. 2d.

"Appellate Review" §296 as follows:

... the ultimate question before the appellate court is whether the trial court has arrived at a correct conclusion. The process of reasoning by which the trial court reached

its conclusion is not regarded as the controlling factor in entering a reversal or affirmance. The court will therefore affirm rather than reverse a judgment or decree if the result is correct, though the trial judge states erroneous reasons for reaching his decision. This is true and even though the reasons advanced by the trial court are inapplicable to the case or otherwise erroneous, or insufficient, and even when the trial judge does not state in his order the reasons therefor. This principle of review is applied in conjunction with the principle that the judgment of the trial court is clothed with the presumption of validity.

Respondent has agreed with eight (8) findings of the referee's report. Those findings appear on page two (2) of this brief.

However, respondent alleges that there is a "crucial fact" (pg. 24, Respondent's Brief) omitted, that neither McPherson or his client signed the typed agreement and the respective clients did not sign the handwritten agreement. However, there is competent substantial evidence in the form of McPherson's testimony that such was not required. (Tr. 48). Howard's correspondence (The Florida Bar Exh. 1A, 1B, 1C) and testimony established that Howard did not demand a written stipulation signed by the parties before sending the \$7,000.00. (Tr. 182).

Finding #9 is also undisputed. That finding states:

On June 14, 1996, when MR. McPHERSON specifically stated that he believed this Stipulation conformed with

their agreement and that unless there was some revision the Respondent cared to make, he should sign it and send it to JUDGE HANSELL with a copy to him.

All of the foregoing findings are consistent with the remaining findings of the referee.

His challenge to finding #10 regarding the allegedly required signatures was addressed above. In addition, the argument concerning what relief was available to McPherson is immaterial, and contradicted by the testimony. McPherson pursued an action for rescission. (Tr. 58)

The criticisms of findings #11 and #12 are nonsense and blatantly false. McPherson testified as to his understanding which was reinforced by the repeated failure of respondent to respond to his letters. Respondent concedes that he should have responded. (Respondent's Brief, pg. 1). The origin of the impression is also immaterial in view of the evidence that respondent could not have mailed a check which he didn't have. Also, McPherson's original impression resulted from a phone conversation between respondent and his secretary. (Tr. 58). The fact that there was written communication thereafter and not conversations, is immaterial. Respondent failed to dissuade McPherson from his reasonable belief.

Respondent's criticism of finding #13 merely reiterates the foregoing argument. Regarding finding #14, respondent incorrectly asserts that the only

testimony is that the client requested a signed stipulation before payment. That assertion is contradicted by documentary evidence offered by the client, as discussed above.

Respondent's argument regarding paragraph 15 has been addressed in regard to findings #11 and #12. Furthermore, the fact that the checks were written to McPherson and McPherson, has no relation to respondent's failure to correct McPherson's impression. Respondent's argument regarding finding #18, concerning, McPherson's belief that respondent was holding funds is also addressed above.

Respondent's argument regarding finding #19 is a distortion. There is no evidence which contradicts the finding that respondent failed to deny that he was holding funds in his trust account.

Respondent relies upon his own conflicting testimony and letter of September 17, 1996, to challenge finding #21. He implies that McPherson agreed with his letter to McPherson of September 17, 1996. He does so by stating that McPherson "conceded" that the letter "paralleled" their conversation. That does not establish that the letter was correct in all respects. That language appears to be an attempt to be selective regarding McPherson's testimony. McPherson's testimony was that respondent told him that the "money or checks"... (Tr. 73) was

there and available and he was going to send it to me... (Tr. 74). McPherson added: "I don't recall there being a discussion on that stipulation." (Tr. 74). In other words, he did not agree that he understood that the funds were being held because of the absence of a signed stipulation. All of McPherson's testimony and conduct, including correspondence and, seeking a "show cause" and filing for rescission negate respondent's claim. It is clear that the stipulation had been only selectively represented to be the source of the delay. Respondent's understanding that the funds were being held was reasonable and correct as a matter of fact. Respondent was not specifically advised that a signed stipulation was a prerequisite for payment.

Respondent's argument regarding paragraph 23 is not material, in addition to being trivial, labored and insufficient to merit a reply. Respondent does not consider the record, nor advise how his argument, if true, affects the case before this Court. Furthermore, his own letter (The Florida Bar Exh. 2) refers to "checks". That evidence is sufficient to deny respondent's argument regarding finding #24.

Regarding finding #25, the referee was clearly supported by the fact of respondent's silence until September 17, 2000 in the face of all the communications he received. That evidence has been discussed throughout this brief. The argument regarding finding #26 merely repeats the testimony presented by the

defense. Ample contrary evidence is cited throughout his brief including the fact that respondent did not have Howard's check on the date he allegedly mailed it. Furthermore, the conflicts and contradictions in the defense testimony resulted in the referee's finding that respondent was not credible.

The argument regarding finding #29 simply sets up a straw man, an alleged "gratuitous slur" on the part of the referee. If there any evidence of an error by the referee, the only purpose of this argument, is to make a personal attack on the referee.

Respondent's challenge to finding #31 pertains to his representation concerning sending the check (which was not enclosed with his letter). The findings in a November 5, 1996 order were never withdrawn or cancelled. (Tr. 79). Respondent presents no authority to support his claim that the Bar was obligated to call the judge as a witness.

Respondent also claims that he was vindicated because the judge did not find him to be in contempt of court. However, Judge Andrews did not have the benefit of Mr. Howard's documents and testimony or correspondence which prove respondent's defense to be false.

Respondent's argument that finding #33 is imprecise regarding the relief sought by McPherson because it refers to different counts filed at different times.

The finding does refer to a complaint and an amended complaint. For that reason and the fact that respondent does not set forth the alleged significance of his argument, it must be rejected.

Paragraphs 35-38 must be considered together. In paragraph 38 the referee concluded that: "...the respondent's testimony before this referee that he had notified Mr. McPherson's firm of his potential trial conflict and then immediately upon his actual conflict to be not credible."

The referee relied upon respondent's own testimony and a calendar to arrive at the conclusion that respondent's version of the facts was false. The referee's conclusion that several days of delay were involved is not disproved. Furthermore, respondent's version of the record is misleading once more. He claims that the evidence is undisputed that he advised Mr. Beam of the McPherson firm that he had a conflict. He bases this on the claim that McPherson said he did not know about any conversations between Beam and Kirkpatrick.

However, McPherson's testimony does not support that conclusion. He stated that as far as he knew they were ready for trial on April 30th. (Tr. 88). One would have to assume that his partner, having been told of the possible continuation of the trial date, did not inform him of that fact. The reasonable interpretation of McPherson's answer is that they had not been notified.

- Q. Did Mr. Kirkpatrick any time earlier that week contact you and advise you that there was a possibility that he would be seeking a continuance?
- A. I have no notation of that. I don't know if he called Mr. Beam or not, but I had no -- we were geared up ready to go on the 30th. I know that. (Tr. 88).

The Court will also note that the referee is now advancing a claim that Mr. Beam was told everything regarding the continuance. He faults the Bar for not producing Mr. Beam, and states that the Bar's position is thereby compromised. That argument is absurd. If respondent relied upon what he allegedly told Mr. Beam as the source of his defense, obviously he should have produced Mr. Beam.

The Court will note that, respondent has produced no file, which might contain notations of such communications or indicate the absence thereof. Likewise, as stated above he has not sought the original file or any records which would support his claim of an "overnight" mailing, or of William's involvement.

Respondent's argument regarding finding 39 is immaterial. Furthermore, his claim regarding communicating with Mr. Beam about the bankruptcy filing in advance is not contradicted. (Re finding #50). McPherson stated that he had no knowledge of any such communication and he filed his complaint with the Bar thereafter (Tr. 89). It is totally unreasonable to believe that he did not ask Mr. Beam about his communication before (or since) the filing of the complaint.

Respondent, in regard to paragraph #40, refers to "McPherson's acknowledgment that Kirkpatrick communicated with Beam regarding the Pasco County case." No cite is provided, and McPherson did not testify regarding any specific communication between respondent and Beam. Once again, respondent's reference to the record is sufficiently selective so as to be misleading.

Respondent's argument regarding 42A and B is characterized by a distinction without a difference. He repeats again that witnesses Howard and McPherson and their letters have repudiated - the claim that Howard insisted on a signed stipulation which "his adversary refused to provide." That is strong language. If true, why does respondent also argue that his effort to obtain and send to McPherson a new check and not the torn one "speaks volumes about his intent and credibility in this matter." (Brief, pg. 36). Why would he even ask Howard for checks or send them to McPherson if "his adversary refused to provide" what was allegedly demanded? Furthermore, why didn't he raise the issue in response to McPherson's many inquiries prior to September 17, 1996?

Regarding 42(d), respondent quibbles about Howard's language when identifying a conversation as "probably" being on September 16, 1996. The significance of the added word is non-existent since it is undisputed that the letter to Kirkpatrick containing a check was dated September 17, 1996, the same day respondent claimed to have the "checks".

Regarding the first ruling of a violation (Respondent's Brief, pg. 37) concerning respondent's representations to McPherson on the same day -- September 17, 1996, respondent offers some more absurdity. He says respondent never said that he was sending checks by overnight mail. Respondent's own letters to McPherson establishes that it is exactly what he said. (Tr. 146). He referred to holding "checks" and said: "I will be sending you checks by overnight mail." (Tr.146).

Respondent argues about the referee's conclusion B(1) that respondent made no copy of the check. The evidence is that respondent had no copy of the check (Tr. 149), no receipts regarding mailing (Tr. 151), no tracer with the post office (Tr. 152), and no records (Tr. 153-154). All of those facts undermine his credibility especially in view of the uncontradicted testimony that McPherson never got the check. Cantera and respondent were not credible witnesses in regard to the check being mailed.

B(2)(d) of the referee's report is factually correct. Between October 9, 1996, and September 17, 1996, there was no communication from respondent to the effect that he had mailed the check. B(2)(e) is not necessary to support the referee's findings of guilt. B(2)(f) is also correct insofar as respondent did not contact the post office (Tr. 152) and he did not communicate with McPherson

regarding searching for the check. (Tr. 137).

In respect to B2(g)(h)(I), the findings are substantiated. Respondent took none of the actions that one would have taken. The Bar would adopt by reference those findings and citations to the record.

Respondent's total answer is that "the evidence shows that Howard communicated with Williams." Respondent doesn't cite the record or say when because the record reflects minimal communication with Williams (a June 20th letter) and no evidence of communication subsequent thereto. Respondent's efforts to insist that the primary communications were with Williams (Tr. 70) is supported by nothing and contradicted by all of the correspondence and raises more questions about respondent's credibility.

Further, the question of intent to delay the continued trial by filing for bankruptcy on the day of the scheduled trial is raised. Intent, of necessity, must be proved by circumstantial evidence. Respondent's pattern of behavior was a consistent pattern of delay.

In regard to The Florida Bar v. Brake, 767 So. 2d 1163 (Fla. 2000), the Bar would submit that The Florida Bar v. Della Donna, 583 So. 2d 307 (Fla. 1991) should apply. In this case respondent is acting as his own attorney in the bankruptcy proceeding and Rule 4-8.4(d) should apply.

II.

THE RESPONDENT HAS ESTABLISHED NO DUE PROCESS VIOLATION REGARDING THE REFEREE'S CONCLUSION THAT RESPONDENT LIED TO MCPHERSON ON SEPTEMBER 17, 1996

Respondent bases his argument upon an extremely limited reference to the allegations contained in the complaint. The allegations of the complaint did state that respondent's statement to respondent on September 17, 1996, that he was holding checks and would sent them overnight, was false. The pertinent allegations follow:

21. A hearing was scheduled for September 18, 1996 in regard to the failure of the defendant to make the first payment of \$7,000.00.
22. On September 17, 1996 respondent advised McPherson that he

was holding checks and would send them by overnight mail "pending receipt of an executed stipulation."

23. The foregoing representation induced McPherson to cancel the September 18, 1996 hearing.
24. No check was forwarded. The respondent offered the following as excuses:
 1. The checks were lost in the mail; and
 2. The funds were not sent because he had not received an executed agreement.
25. In truth and in fact, the respondent had received a copy of the signed agreement. Nevertheless, a new copy was mailed on September 20, 1996.
26. Despite the fact that the respondent was provided with a new copy of the signed agreement no payment was received.

(Paragraphs 27 and 28 allege that a similar representation was made to Judge Andrews and that the representation was "false".)

29. Based upon the foregoing, respondent is in violation of Rule **4-8.4**, subsections **(c)**(engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and **(d)**(engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice) of the Rules of Professional Conduct.

The pleading in this case pertaining the September 17, 1996 promise to mail the check meets the requirement of Florida Rules of Civil Procedure 1.110(b) which calls for "a short and plain statement of the ultimate facts. Subsections (f)

and (g) provide that separate counts are not required. Here there is an interconnected pattern of behavior appropriate for one Count. Furthermore, the rule provides that "All pleadings shall be construed so as to do so substantial justice." The only requirement is that the allegations must be sufficient to acquaint the defendant with the plaintiff's charge of wrongdoing. Fontainebleau Hotel Corp. v. Walters, 246 So. 2d 563 (Fla. 1971) conformed to 248 So. 2d 681, mandate conformed to 253 So. 2d 881.

Respondent's reference to The Florida Bar v. Vernell, 721 So. 2d 705 (Fla. 1998) is therefore inapplicable. Vernell deals with "an offense not charged in the complaint" (Tr. 707). The offense was charged in the complaint in this case.

Furthermore, the Bar did not violate Florida Rule of Civil Procedure 1.120 (incorrectly cited by respondent as Rule 1.020 which was repealed). The pleading is adequate when the allegations are stated with such particularity as the circumstances permit. Williams v. Guyton, 167 So. 2d 7 (Fla. 3rd DCA 1964).

The circumstances in this case are set forth in the pleading. Those circumstances are not complex. Respondent promised McPherson that he would mail the check(s). He did not do so. No additional facts are required.

III.

THE REFEREE DID NOT ERR BY DECLINING TO RECUSE HERSELF

The conduct of which respondent complains was the referee's review of documents which were part of the record. One cannot assume that the examination of those documents demonstrates a bias favoring either party. The referee had no way of knowing whether the materials reviewed would support the Bar's position on the respondent. The fact that some of the information in question would support the Bar's position was an unknown. One cannot assume that the referee would not have utilized any facts which favored the respondent.

In his Motion for Recusal respondent advanced the reason that the referee

considered matters outside the record. The documents were provided to the Bar on May 8, 2000, in response to Bar's Request for Production. They were filed by the respondent.

Rule 1.350(d) of the Rules of Civil Procedure provides:

Filing of Documents. Unless required by the Court, a party shall not file any of the documents or things produced with the response. Documents or things may be filed when they should be considered by the Court in a matter pending before the Court.

(Emphasis added)

Respondent also presented the argument in his motion to recuse that the record did not include the materials in question. However, Rule 3-7.6(1)(2) of the Rules Regulating The Florida Bar provides:

Contents. The Record shall include all items properly filed in the cause including pleadings transcripts of testimony, exhibits in evidence, and the Report of Referee.

The referee's reliance on the documents in question provides no basis for recusal. Even if there was an error of law, that does not establish the existence of prejudice. Suarez v. State of Florida, 115 So. 519 (Fla. 1928).

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's report should be approved.

RANDI KLAYMAN LAZARUS
Bar Counsel
TFB #360929
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN F. HARKNESS, JR.
Executive Director
TFB No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
Tel: (850) 561-5600

JOHN ANTHONY BOGGS
Staff Counsel
TFB No. 253847
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
Tel: (850) 561-5600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's answer brief was forwarded via Airborne Express (Airbill #3370023926) to **Thomas D. Hall**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to respondent's attorney, **Joel Kaplan**, 100 N. Biscayne Boulevard, Suite 1100, Miami, Florida 33132, on this _____ day of January, 2001.

RANDI KLAYMAN LAZARUS
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.

RANDI KLAYMAN LAZARUS
Bar Counsel