

**IN THE SUPREME COURT OF FLORIDA  
Supreme Court Case number SC97070**

**THE FLORIDA BAR,**

**Complainant,**

**vs.**

**JOHN EVRON KIRKPATRICK,**

**Respondent.**

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**RESPONDENT'S REPLY BRIEF**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES.....3**

**INTRODUCTION.....4**

**PETITIONER MISSTATES THE EVIDENCE  
AND THE TESTIMONY.....4**

**THE BAR’S ANSWER BRIEF CONTAINS REPEATED  
UNWARRANTED SPECULATION REGARDING  
WITNESSES’ POSSIBLE (BUT UNHEARD) TESTIMONY.....7**

**THE BAR’S ARGUMENT REGARDING THE MOTION  
FOR CONTINUANCE AND THE FILING FOR CHAPTER  
11 PROTECTION IGNORES THE FACTS AND THE LAW.....8**

**THE BAR’S ARGUMENT THAT RESPONDENT WAS  
CHARGED WITH MAKING A MISREPRESENTATION  
ON SEPTEMBER 17, 1996 FAILS BECAUSE THERE  
IS NO ALLEGATION OF FALSITY IN THE COMPLAINT.....10**

**THE BAR’S ARGUMENT THAT THE REFEREE  
DID NOT HAVE TO RECUSED HERSELF  
ESTALBISHES THAT SHE SHOULD HAVE  
RECUSED HERSELF.....10**

**CONCLUSION.....12**

**CERTIFICATE OF SERVICE.....13**

**TABLE OF AUTHORITIES**

*Moseley v. American Medical International, Inc.,*  
712 So. 2d 1149, 1151 (Fla. 4<sup>th</sup> DCA 1998).....10

*The Florida Bar v. Vernell, 721 So. 2d 705 (Fla. 1998).....10*

*The Florida Bar v. Della Donna, 583 So. 2d 307 (Fla. 1991).....9*

## INTRODUCTION

Unable to defend the Referee's findings and conclusions on the record, the Bar seeks to fashion an argument based upon misstatements of the record and unwarranted assumptions. The many and important errors and mistakes in the Answer Brief require a response. This Reply Brief addresses only the most important.

### PETITIONER MISSTATES THE EVIDENCE AND THE TESTIMONY

Bar disciplinary proceedings should be based upon an accurate statement of the record. Several of the more important errors and misstatements in the Answer Brief follow.

(1) Petitioner states, "A stipulation agreement was drafted to be signed by the attorneys. There was no place for signature of the parties. (Tr. 48, Bar Ex. 4)." (Ans. Br., Page 17).

This is incorrect. The stipulation contains a signature line for

both the parties and the attorneys. It states that it is not binding until signed by both the parties and their attorneys. The stipulation is reproduced in full on the following page with the pertinent segments highlighted.

The Bar states: "Attorney McPherson had sent a signed stipulation to Respondent on May 30, 1996." (Ans. Br., Page 17). "McPherson mailed a new signed stipulation." (Ans. Br., Page 6).

McPherson testified that he did not sign the typewritten stipulation (Tr. 48; 97; 106-7) and a signed stipulation was not produced at trial.

(2) In discussing the events of September 17, 1996, the Bar states that Respondent "could not have mailed a check that he didn't have..." Ans. Br., Page 10. "It is impossible for Respondent to mail a check that he didn't have." Ans. Br. Page 11. "He could not have had the check because it wasn't mailed until that same date." Ans. Br. Page 25. "He could not have mailed a check he didn't have." Ans. Br., Page 29. He "did not have Howard's check on the date he allegedly mailed it." Ans. Br., page 31.

The Bar's own witness James Howard, however, established just the opposite. He stated that he sent a \$7,000 check to Respondent on June 8, 1996. D18-19; D5.

His cover letter introduced by the Bar as an exhibit refers to the check he mailed on July 8, 1996. He stated that he sent a replacement check on September 17, 1996. D11. The Bar's argument requires that the fact-finder ignore the check sent on June 8, 1996 and the replacement check sent on September 17, 1996. The Bar ignores both in its Answer Brief.

(3) The Bar states that "[Howard] did not ask for a signed stipulation before sending the check." (Ans. Br., Page 3). "He did not ask about the stipulation." (Ans. Br., Page 4).

There is no such testimony from Howard. The only record testimony is Respondent's testimony that until persuaded otherwise on September 17, 1996, Howard requested a signed stipulation before the check was sent to McPherson. And, Howard's letter of June 8, 1996, to Respondent notes that he still has not seen a written stipulation.

(4) In its description of the proceedings in Pinellas County, the Bar incorrectly states that on November 21, 1996, the trial judge, the Honorable Horace Andrews, found that Respondent made a misrepresentation:

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 plaintiff's 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).

Ans. Br., Page 21.

While the reference to the year 2000 instead of 1996 may be a typographical error, no reasonable explanation exists the inaccuracy of the balance of the paragraph which directly contradicts Judge Andrews' written findings. To make sure that no ambiguity exists, Judge Andrews' written finding--that he accepted Respondent's testimony-- is set forth verbatim:

2. That Mr. Kirkpatrick stated that he had in his possession a check from his client, JAMES HOWARD, in the amount of \$7,000.00 and made payable to McPherson & McPherson, P.A. Trust Account which was intended to comply with the terms of the Mediation Agreement dated May 29, 1996;
3. That Mr. Kirkpatrick further represented that he was under the impression that said check for \$7,000.00 had been mailed to Plaintiff's counsel but that if Plaintiff's counsel had not received it, then it must have become lost in the mail or else it was still in Mr. Kirkpatrick's possession;
4. That Mr. Kirkpatrick further represented that he would search for said check and forward it to counsel for Plaintiffs as partial payment of the \$17,000.00 Final Judgment entered against JAMES HOWARD and KEY FINANCIAL PLANNING, INC., on November 15, 1996.

And *the Court having accepted and been satisfied with these representations*, and the Court being duly advised in the premises...

Judge Andrew's Order dated November 21, 1996, Bar Ex. 12. As is clear from the above quoted language, the Bar's contention that the trial judge found that Respondent made a misrepresentation is incorrect.

**THE BAR'S ANSWER BRIEF CONTAINS REPEATED  
UNWARRANTED SPECULATION REGARDING  
WITNESSES' POSSIBLE (BUT UNHEARD) TESTIMONY.**

Bar disciplinary proceedings should be based upon evidence, not mere speculation. Without evidence, the Bar and the Referee resort to speculation and the stacking of inference upon inference. Several non-inclusive examples follow.

(1) The Bar asks this Court to assume that Respondent did not advise opposing counsel Beam about the conflict because McPherson stated "I don't know if he called Mr. Beam or not..." Ans. Br., page 33.

The Bar substitutes its conjecture for McPherson's lack of knowledge. The fact that McPherson's firm was "geared up" for trial reflects only the expected sequellae of Beam's refusal to agree to a continuance even though Respondent had a conflict with a federal court case.

(2) On page 34 of its Answer Brief, the Bar speculates that Respondent did not inform Beam that he was filing for Chapter 11 protection because of McPherson's ignorance of any such conversations. "It is totally unreasonable to believe that he did not ask Mr. Beam about his communication before (or since) the filing of the complaint." Ans. Br., Page 34. The Bar never asked McPherson whether he had such a conversation.

The Bar bears the burden of proof. It did not call Beam and it did not ask McPherson if he spoke to Beam. There is no basis for the Bar's argument.

(3) The Bar asks this Court to assume that Judge Andrews did not have documents before him regarding the November 21, 1996 hearing. Ans. Br., Page 31. There is no evidence of what documents Judge Andrews reviewed.

(4) The Bar argues that Howard did not ask for documentation regarding the settlement. Ans. Br., Page 25. The Bar did not ask Howard whether he required a signed settlement agreement. Its argument is pure conjecture. Moreover, in light of the letter Howard wrote Respondent on June 8, 1996, cited above, the Bar's failure to so inquire is not surprising.

THE BAR'S ARGUMENT REGARDING THE MOTION FOR CONTINUANCE AND THE FILING FOR CHAPTER 11 PROTECTION IGNORES THE FACTS AND THE LAW.

The Bar's complains about Respondent's "***constant seeking of continuances and failure to abide by his promises...***" (Ans. Br., Page 21). This proceeding, however, only addressed one continuance. This proceeding does not involve a failure to abide by promises.

The Referee found that the motion for continuance was prejudicial to the administration of justice because Respondent should have notified opposing counsel of the conflict five calendar days - two business days - earlier than the Referee found that he did. The only record evidence is that Respondent notified opposing counsel who refused to agree to a voluntary continuance. That refusal necessitated the filing of an emergency motion for continuance two business days later.

Even if there was evidence that Respondent waited two business days before notifying opposing counsel, that would not be the basis for Bar discipline. The Bar cited no authority and Respondent found none which indicates that such conduct violates Bar rules. Most importantly, the

trial judge never expressed any dissatisfaction with how Respondent handled this matter.

The same is true with regard to Respondent's petition for Chapter 11 protection. The sole evidence in the record is that it was filed to delay the foreclosure of Respondent's home which was scheduled for sale the week of the proceeding. The petition had the incidental effect of staying of the proceeding against Respondent. Nevertheless, the Referee faults Respondent for not notifying opposing counsel that he intended to file the Chapter 11 proceeding. The sole record evidence is that Respondent gave prior notice. As discussed earlier, the Bar asks this Court to make the unwarranted assumption that McPherson's ignorance of the conversations between Respondent and Beam is evidence that such conversations did not occur.

Finally, the Bar cites no authority to support the proposition that the filing of the Chapter 11 Petition constitutes a Bar violation. The one case the Bar cites, *The Florida Bar v. Della Donna*, 583 So. 2d 307 (Fla. 1991), is inapposite. *Della Donna* stands only for the proposition that a lawyer who represents himself can commit a bar violation.

**THE BAR PRESENTS NO EVIDENCE THAT RESPONDENT  
MADE A MISREPRESENTATION TO JUDGE ANDREWS**

The Answer Brief is strangely silent when it comes to the presentation of evidence that Respondent made a misrepresentation to Judge Andrews. The reason is clear. There is no evidence that Respondent was not under the impression that the check had been forwarded to McPherson. There is no evidence that Respondent did not intend to search his office to look for the check. Were there any evidence to support the foregoing, the Bar would have presented such evidence.

Instead of presenting evidence, the Bar relies on its conjecture and speculation regarding what may have happened and ignores the testimony. In the absence of evidence establishing falsity, there should be no finding of misrepresentation. Instead of presenting evidence, the Bar mischaracterizes Judge Andrews's findings. See page 6, *infra*.

**THE BAR'S ARGUMENT THAT RESPONDENT WAS  
CHARGED WITH MAKING A MISREPRESENTATION  
ON SEPTEMBER 17, 1996 FAILS BECAUSE THERE  
IS NO ALLEGATION OF FALSITY IN THE COMPLAINT.**

It is axiomatic that a charge of misrepresentation requires an allegation that the alleged representation was false. *Moseley v. American Medical International, Inc.*, 712 So. 2d 1149, 1151 (Fla. 4<sup>th</sup> DCA 1998). The Bar's complaint charges that Respondent's statements to Judge Andrews on November 21, 1996 were false. There is no other assertion

that Respondent made a false statement. Respondent was given no notice that he was being charged with making a different false statement. In such a circumstance, Respondent could not be found guilty of having made a misrepresentation for which he was not charged. The Bar's complaint provides no notice to Respondent that he was charged with making a misrepresentation on September 17, 1996. Accordingly, *The Florida Bar v. Vernell*, 721 So. 2d 705 (Fla. 1998), is directly on point.

**THE BAR'S ARGUMENT THAT THE REFEREE DID  
NOT HAVE TO RECUSED HERSELF ESTALBISHES THAT  
SHE SHOULD HAVE RECUSED HERSELF.**

The Bar cites absolutely no authority to contradict Respondent's argument that the Referee should have disqualified herself for seeking out evidence outside the trial record in the effort to bolster her findings against Respondent. Instead, the Bar makes two arguments. First, it argues that the fact-finder may examine extrinsic evidence if it does not know what the evidence contains. ("The Referee had no way of knowing whether the material received would support the Bar's position on the respondent.") Ans. Br., Page 41. Second, it argues that such conduct can be dismissed as harmless error. ("that does not establish the existence of prejudice." Ans. Br.,

page 42. Both arguments demonstrate the weakness of the Bar's position.

As to harmless error, in her initial oral ruling, the Referee stated that she relied on extrinsic evidence to make findings against Respondent. Thus, the action cannot be deemed harmless under the test for "harmless error."

Further, the Bar failed to cite one case from any jurisdiction that applies the harmless error rule to a disqualification. All cases which address this issue state that when the trier of fact reviews evidence outside of the record, a new trial is mandated.

As to the argument that the Referee should be allowed to fill in the gaps in the case made by the Bar, the argument shows prejudice. The Referee put on the hat of prosecutor when she sought additional evidence to help the Bar. Further, Respondent did not have the opportunity to review or explain the evidence, thereby depriving him of due process rights. Finally, the assumptions made by the Referee regarding the materials she reviewed establish more prejudice. For example, she states that she can infer that the Chapter 11 petition was hastily drawn because its cover sheet was hand written. Based upon that inference, she infers that there was no conversation with Mr. Beam. Based upon that inference, she infers that Respondent lacked

credibility when he stated that the petition was filed to avoid a foreclosure sale of his personal residence that week. This improper stacking of inferences, that started with her review of extrinsic evidence, establishes the prejudice Respondent suffered due to the Referee's journey outside the record.

### CONCLUSION

The Bar accuses Respondent of making an unfair and one sided presentation of the facts but fails to point out a single error or omission. ("This Court will note that the respondent has submitted a one-sided highly argumentative presentation of the Case and Facts.") Ans. Br., page 1; ("a limited one sided argumentative summary,") Ans. Br., Page 6. The Bar, however, presents mistakes of fact, unwarranted assumptions, and unsupported legal arguments. This Court should reject the Referee's findings and conclusions or, in the alternative, remand with instructions that the Referee disqualify herself and that the matter be heard before a different Referee.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Randi Klayman Lazarus, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 this 19 day of March, 2001.

\_\_\_\_\_  
JOEL KAPLAN, ESQUIRE

**Certificate of compliance**

— I hereby certify that the foregoing Reply Brief the Respondent has filed in this cause complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure, in that it is a computer-generated document in Courier New 12-point font type.

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Joel Kaplan, Esquire