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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MARK J. KAUFMAN,

Respondent.

_____/

Case No. 71,140

TFB File No. 85-11493-08

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is the Answer Brief of the Respondent, MARK KAUFMAN (hereinafter KAUFMAN) to the brief filed by THE FLORIDA BAR (hereinafter the BAR) in support of its Petition for Review. This review is proceeding on the record which consists of those materials considered by and presented to the Judicial Referee in reaching his conclusion that KAUFMAN violated none of the disciplinary and integration rules referred to in the BAR's complaint. For reference by the Court, relevant portions of the record before the Judicial Referee accompany this Brief as an Appendix. Reference thereto will be designated by the symbol "A".

STATEMENT OF THE FACTS

The facts before the Judical Referee will be summarized below. The single most significant and overriding factual point presented to the Judicial Referee was that on February 24, 1988 a stipulation was filed with this Court (entered into by counsel for KAUFMAN and the BAR) that the photographs upon which this entire case turns had been lost and that the "...aforementioned photographs were necessary for the prosecution of this cause." (A 2) This stipulation was entered into at a point in time when the original hearing before the referee was being continued for the stated purpose of continuing to attempt to ascertain the location of the photographs. Later, and immediately before the hearing before the Judicial Referee, by letter to Bar counsel it was further confirmed that the photographs had not been located, and that at the conclusion of the Grievance hearing the photographs remained in the possession of the BAR and could not be found (A 8).

There is no question but that this matter went to the Judicial Referee with the BAR being in the position of not having its witnesses present at the hearing, and having lost the photographs which the BAR had earlier stipulated were crucial to the prosecution of this case. The procedure employed by the Judicial Referee (which in reality was nothing more than allowing counsel to proffer their

respective positions) was never objected to by Bar counsel and fully participated in by him (A 20).

The events which gave rise to the BAR's prosecution occurred in May 1984 (A 11). Instigated by a complaint to the BAR filed by KAUFMAN's former law partner, the Grievance Committee met on March 19, 1986 and found probable cause to prosecute KAUFMAN for alleged Bar violations (A 27; A 110; A 225). The disciplinary action remained dormant for one and a half years thereafter until the BAR filed its formal complaint against KAUFMAN with this Court on September 15, 1987 (A 11). This Court immediately appointed Judge Carven Angel as the Referee on September 22, 1987, and he subsequently scheduled the final hearing for March 2, 1988. The final hearing was continued to September 29, 1988 based on the BAR's and KAUFMAN's counsel's signed and filed stipulation stating that crucial photographic evidence, last in the BAR's possession and which had since been lost, was "...necessary for the prosecution of this cause." (A 2) (emphasis added)

At the September 29, 1988 final hearing, the Referee, after noting that the BAR's witnesses had failed to show up, suggested the parties address KAUFMAN's Trial Brief (A 20). All parties agreed to the procedure and after conducting a hearing in which the BAR and KAUFMAN participated, the Referee dismissed the allegations presented by the BAR's

complaint (A 41; A 1).

The BAR's prosecution in this action was initiated by KAUFMAN's former law partner who filed several grievances with the BAR pertaining to their past association (A 27; A 110). KAUFMAN's partner filed these grievances while the parties were engaged in a bitter civil suit as to their dissolved partnership. The present complaint stems from allegations regarding KAUFMAN's representation of two former clients. The clients, Linda and Carol Horan, received severe facial injuries which required approximately 60 and 25 stitches respectively, when they went through the windshield of their car in an automobile accident with another driver in October 1983 (A 27; A 48; A 76). KAUFMAN, or a representative of his firm, presented the adverse driver's insurance company (USAA) with documentation of the young women's injuries to support their claim. The documentation included medical bills, medical reports, oral reports on their condition, an opportunity to view the injured women, and a series of photographs, several of which were taken in the hospital immediately after their injuries, and several of which were taken sometime later (A 17).

In May 1984, USAA requested additional updated photographs as evidence of permanent scars. KAUFMAN, or a representative of his firm, complied and took polaroid pictures of the Horans (A 15; A 21; A 195). To best indicate

the extent of the scars, he had the Horans remove the considerable amount of makeup they were wearing. However, without their street makeup, the glare from the camera's flash obliterated the scars, so he applied a flesh tinted cosmetic to the scarred areas to counter the glare (A 21). In June 1984, after completely reviewing the entire file, medical reports, earlier photos, and updated May 1984 photos of both the Horans, USAA responded and ultimately settled (A 17).

The Grievance Committee met in Gainesville, Florida on March 19, 1986 (A 95). After noting several irregularities in the proceedings, such as members with conflicts with KAUFMAN refusing to recuse themselves from participation, the BAR proceeded with the hearing (A 104; A 109). At the Grievance hearing, the BAR called the BAR's investigator, Claude Meadow, as a witness (A 116). Meadow presented the BAR's subpoenaed evidence from USAA. This evidence consisted of the photographs taken of the Horans at the hospital and the polaroid photographs taken in May 1984. The BAR entered these photographs into evidence as Composite Exhibit 3 and they were retained by the Committee, and became part of the record (A 117; A 118). Meadow also introduced enlarged representations of the polaroids which the Committee reviewed and retained, but which were not entered as an exhibit because they were not made from the

same negatives as the polaroids (for which there were no negatives at all) and because the only probative evidence was the polaroids (A 118 - A 120; A 125).

No USAA representative was called or questioned at the hearing and the Committee made no inquiry as to USAA's reliance on the photographs or on what basis USAA settled with Linda and Carol Horan. KAUFMAN testified that the only reason any makeup was applied was to negate the obliteration of the scars that is a result of a polaroid flash (A 196).

After the Committee found probable cause, the case lay dormant for a year and one half and was not revived until September 15, 1987 when the BAR filed its formal complaint with this Court (A 11). During the course of the nearly two years between the March 19, 1986 Grievance Committee hearing and the initially scheduled March 2, 1988 referee hearing, the crucial photographic evidence, entered by the BAR as Composite Exhibit 3 at the Grievance Committee hearing and last in the BAR's possession, was lost. Because the photographs were missing, proceeding to the hearing would be fruitless. The BAR recognized this and stipulated to a continuance. The BAR's and KAUFMAN's counsel signed and duly filed the stipulation on February 24, 1988, which states that "(t)he aforementioned photographs are necessary for the prosecution of this cause." (A 2) Based on the joint stipulation, the Referee rescheduled the final hearing

for September 29, 1988.

Prior to the September 29, 1988 hearing, the BAR agreed to KAUFMAN's motion to sever the Horan complaint from two other distinct complaints that the BAR was prosecuting concurrent with the present action, both of which had been filed on February 18, 1986, several years after the initial grievances had been registered with the BAR in each, and both of which have since been dismissed - one by the BAR voluntarily and the other by the Referee (A 9).

In order to confirm the status of the evidence, KAUFMAN's counsel wrote a letter to the BAR's counsel and asked the BAR to respond if he was wrong that photos last in the BAR's possession were lost (A 8). The BAR did not respond or disagree with KAUFMAN's assertion that there had been no change in the status of the evidence since the parties signed the February 1988 stipulation. The photographic evidence that was necessary in February was still necessary to prosecute the case in September and still lost.

Prior to the September 29, 1988 final hearing, KAUFMAN filed a Trial Brief with the court that discussed the status of the evidence, the extreme delay in the BAR's prosecution, and the stipulated fact that the BAR could not produce the only evidence which was necessary to the prosecution of its cause (A 3). KAUFMAN hand delivered a copy of this brief to

the BAR prior to the hearing as well. Prior to the hearing, BAR counsel informed KAUFMAN that he intended to call Linda and Carol Horan to testify. After waiting some time, the BAR's witnesses had still failed to arrive for the hearing when the Referee was ready to proceed (A 20).

Since the witnesses had not arrived, the court proposed that KAUFMAN's Trial Brief, which included his motion to dismiss, be addressed (A 20). Discussion on the motion proceeded without objection from BAR counsel. The final hearing began as a discussion of the brief and motions and branched out to encompass a full discussion of the facts, case, and record, which included the signed and filed stipulation, Grievance Committee hearing transcript, and subsequent deposition testimony of the Horans. The BAR, KAUFMAN's counsel and the Referee all fully and actively participated in the entire proceedings (A 20 - A 41).

After some discussion between KAUFMAN's counsel and the Referee, the Referee asked for a response from the BAR (A 28). The BAR counsel specifically outlined the evidence the BAR expected to present if its witnesses appeared. The BAR never asked for a continuance or an opportunity to call its witnesses and could not in fact have called Linda and Carol Horan because they were not present either at the start or conclusion of the hearing.

In further discussion with the court, the BAR admitted

that USAA immediately settled with Linda for the $10,000.00 policy limits and stated that an adjuster in fact did see her, disputing the allegation in its complaint and earlier argument that the insurance company settled based only on the photographs (A 32; A 34).

KAUFMAN's counsel in presenting KAUFMAN's case, established, through reference to the transcript of the Grievance Committee hearing that:

1. The BAR subpoenaed the photographs from USAA which consisted of photographs taken at the hospital and the May 1984 polaroids.

2. These photographs were introduced into the hearing and record as Composite Exhibit 3.

3. The BAR attempted to introduce enlarged facsimilies of the polaroids, but withdrew them from evidence since they contradicted the best evidence rule.

4. At the end of the hearing, the photographs remained in the BAR's possession as a formal exhibit to the transcript (A 21; A 26; A 29-30).

5. The complaint was brought by KAUFMAN's law partner as a tool to gain leverage in ongoing civil litigation between the parties (A 27-28).

In addition, by comparing Linda and Carol Horan's depositions taken at the Grievance hearing and a second deposition taken on February 19, 1988 at which BAR counsel

was present, KAUFMAN's counsel demonstrated that there existed substantial discrepancies in the Horans' recollection of what the photographs looked like and how they depicted the scarring (A 23; A 24). During all of this time, the Horans still had not appeared for the hearing.

During a further exchange it was established that USAA had never made an objection to the settlement, and never filed a complaint against KAUFMAN despite being notified in 1986 of the grievance and the act of applying makeup. The Horans had no complaint and had each settled their cause of actions for $10,000.00, and were only involved in the grievance because KAUFMAN's former law partner called them and asked if they would help him out and testify (A 26-27; A 172). It was established that KAUFMAN acknowledged that he used flesh colored makeup to obviate the shine on the polaroids, and that the USAA adjuster had been free to see the girls at any time (A 22; A 36-A 37). Finally the Referee was made aware of the BAR's conduct and delay in the prosecution of this action (A 25; A 3).

The Horans never appeared. The Bar made no motion for a recess or continuance. The BAR never objected to the procedure followed.

At the conclusion of the hearing, after substantial oral argument by both parties, the Referee ruled in KAUFMAN's favor.

SUMMARY OF ARGUMENT

It is undisputed that the BAR must prove KAUFMAN's guilt by clear and convincing evidence. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987); The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984). It is equally undisputed that the Referee's decision below comes to this Court with a presumption of correctness. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986); The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); Fla. Bar Rules of Discipline, 3-7.6(c)(5). The BAR in this case has lost the evidence that it stipulated was "necessary" to the prosecution. The BAR cannot possibly meet its "clear and convincing" standard without evidence it lost and admits is "necessary".

The "proffer" procedure utilized below was consented to and participated in by the BAR. In fact, the procedure was utilized as a accommodation to the BAR since the BAR's witnesses were not present when the hearing began and never even appeared throughout the hearing.

The Referee was permitted to make credibility determinations from the proffer and accept KAUFMAN's version that no wrongdoing had occurred in that the makeup was applied not to enhance the scars but simply to prevent their obliteration by the flash.

ARGUMENT

POINT I

THE JUDICIAL REFEREE PROPERLY RECOMMENDED TERMINATION OF THIS FIVE YEAR OLD GRIEVANCE PROCEEDING AFTER THE FLORIDA BAR LOST THE CRUCIAL EVIDENCE UPON WHICH THE BAR COMPLAINT WAS BASED AND AFTER BAR COUNSEL STIPULATED THAT THE LOST EVIDENCE WAS "NECESSARY FOR THE PROSECUTION OF THIS CAUSE."

The BAR misstates the scope of the proceedings at the Referee hearing and the extent of the record in this cause of action when it asserts that "...there were no formal stipulations of facts by either party (and) that the crucial argument centered around the existence of the photographs in question." (Bar Brief 7). Contrary to the BAR's assertion, a review of the record in this cause will undisputedly show that the parties entered into a stipulation as to the availability and necessity of crucial photographic evidence (A 2). The BAR is prosecuting KAUFMAN in a disciplinary action because it asserts that photographs he took of Linda and Carol Horan and presented to USAA misrepresented the extent of their scarring. Nothing could be more crucial to the BAR's cause of action than the best and only evidence on which its case is based.

Both parties acknowledged this on February 24, 1988 by signing a stipulation moving the court to continue the scheduled final hearing then scheduled for March 2, 1988 because crucial photographic evidence last in the BAR's

possession was lost and was necessary to the prosecution of the cause. The stipulation specifically states that "(the) aforementioned photographs are necessary for the prosecution of this cause". (A 2) (emphasis added)

These photographs were last in the BAR's possession at the hearing before the Grievance Committee on March 19, 1986 when the BAR entered photographs subpoenaed from USAA into evidence as Composite Exhibit No. 3 (A 26; A 117-A 118). The exhibit consisted of photographs taken at the hospital immediately after the Horans were injured and updated photographs taken in May of 1984 which demonstrated the extent of their permanent scarring. Over the course of the two-year delay in prosecution the photographs last in the BAR's possession were lost.

Immediately prior to the rescheduled final hearing, KAUFMAN confirmed the lost status of photographs which were last in the BAR's possession with the BAR and asked the BAR to inform him if the status was otherwise (A 8). On September 29, 1988 when the final hearing began, the photographs which had last been in the BAR's possession were still lost (A 21).

In arguments before the Referee and in his Trial Brief, KAUFMAN asserted that nothing could be more prejudicial than to allow testimonial evidence as to what the photographic best evidence did or did not show in the absence of the

originals or even facsimilies which the BAR had made of the photographs (A 21-A 22; A 3-A 5). Florida Statutes, §90.951. This evidence is particularly necessary and crucial in a Bar disciplinary proceeding which has many parallels to a criminal action because the personal deprivation on an ajudication of guilt is potentially great and the BAR is required to prove its allegations by clear and convincing evidence. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987); The Florida Bar v. Musleh, 453 So.2d. 794 (Fla. 1984).

Florida courts have consistently held that an accused is denied a fair trial in a criminal action when the state or its agents either intentionally or negligently destroy or lose crucial evidence so that the defendant is unable to test or examine the most critical and inculpaltory evidence against him, while at the same time allows testimony from the state as to what the "lost" evidence did or would show. State v. Lee, 422 So.2d 76 (Fla. 2d DCA 1982); State v. James, 404 So.2d 1181 (Fla. 2d DCA 1981). A deprivation of constitutional rights would occur if the BAR had been permitted to proceed with this prosecution when it was unable to produce physical evidence which was last in its possession. See, Adams v. State, 367 So.2d 635 (Fla. 2d DCA 1979).

KAUFMAN further argued that the extreme delay in

prosecution coupled with the stipulated facts demonstrated that he would be prejudiced if further testimony as to what the lost photographs looked like would be allowed. Florida courts have held when the defendant can show his cause is prejudiced by the loss of important evidence a conviction simply cannot stand. Adams v. State, supra, and State v. Counce, 392 So.2d 1029 (Fla. 4th DCA 1981).

BAR counsel and KAUFMAN's counsel agreed that the crucial lost photographic evidence, last in the BAR's possession, was necessary to the BAR's prosecution of this cause (A 2). The Referee heard arguments at the final hearing based on stipulations in the record which both parties signed and duly filed.

It is without dispute that a stipulation is a voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate the need for proof or to narrow the range of litigible issues in a cause of action. Arrington v. State, 233 So.2d 634 (Fla. 1970). Although the BAR earlier agreed and stipulated that the photographs were necessary when it attempted to continue the initial March 2, 1988 final hearing, the BAR now claims and asserted at the Referee's hearing that the photographs were not necessary to its prosecution (A 32). In its initial brief to this Court, the BAR alleges that the necessity theory is one propounded by KAUFMAN only and states that:

> "The thrust of Respondent's argument to the Referee was that after the probable cause hearing before the Eighth Circuit Grievance Committee the photographs taken by Respondent of Carol and Linda Horan were lost and not available at the formal hearing before the Referee. Respondent argued that such photographs were necessary and essential for The Florida Bar to prosecute its case against Respondent and without the photographs it was impossible for The Florida Bar to meet its burden of proof." (Bar Brief, p. 4)

It seems as though the BAR would have this Court believe it was not a party to this stipulation and never agreed to the necessity of the photographs. This is a departure from the facts on which KAUFMAN relied and on which the Referee tried the cause.

Florida courts have clearly established that it is incumbent on the moving party to avoid the consequences of a written stipulation to show good cause why the terms of the stipulation should not be carried out. Xenakis v. Leslie, 152 So.2d 500 (Fla. 2d DCA 1963) In order to obtain relief from a stipulation, a party must file a timely motion with the court showing good cause why the stipulated facts should be ignored. Lopez v. Dublin Company, 489 So.2d 805 (Fla. 3d DCA 1986) and Xenakis, supra. It is within the court's discretion to grant or deny such a motion. The stipulation will be strictly enforced unless the court grants relief pursuant to approved procedure on grounds of mistake, fraud, misrepresentation or manifest injustice. Lopez, supra.

Trial courts strictly adhere to stipulations unless the

parties properly overturn them. For example, in a disciplinary suspension hearing involving an administrative agency, the court overturned the employee's suspension when the hearing examiner relied on evidence which had been objected to and was outside the scope of the parties' stipulation. Gandy v. Dept. of Offender Rehabilitation, 351 So.2d 1133 (Fla. 1st DCA 1977).

BAR counsel and KAUFMAN's counsel stipulated as to the necessity of the lost photographic evidence in the BAR's prosecution of this cause. Both parties signed and filed the stipulation on February 24, 1988 (A 2). The case came before the Referee subject to the stipulation. When a case is tried upon stipulated facts, the stipulation is conclusive and is binding not only upon the parties, but also upon the trial and appellate courts and no other or different facts will be presumed to exist. Lopez, supra, Troup v. Bird, 53 So.2d 717 (Fla. 1951); Columbia Bank for Coop. v. Okeelanta Sugar Coop., 52 So.2d 670 (Fla. 1951). Florida courts have held that a party is estopped from taking self-contradictory legal positions and will not condone the "Catch-22" or "Gotcha" school of litigation. Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337 (Fla. 3d DCA 1979).

This Court likewise should not permit the BAR to deny a written, signed and filed stipulation merely by later

asserting that the lost photographic evidence is not necessary after all and should affirm the Referee's findings in the case below and hold for KAUFMAN.

POINT II

THE BAR CANNOT COMPLAIN ABOUT THE PROCEDURE EMPLOYED BY THE JUDICIAL REFEREE AT THE HEARING BELOW WHERE THE BAR FAILED TO OBJECT TO THE PROCEDURE AND FULLY PARTICIPATED IN IT AND AVAILED ITSELF OF A FULL OPPORTUNITY TO PRESENT IN THE FORM OF A PROFFER ALL PERTINENT FACTUAL MATERIAL WHICH THE BAR CONSIDERED RELEVANT.

The BAR petitions this Court for a review and asks that the Referee's decision below be reversed based solely on the allegations in its Initial Brief. KAUFMAN was called on to answer to the BAR's allegation that he violated certain disciplinary and integration rules because he submitted photographs to USAA in support of his clients' claims, which the BAR asserts misrepresented the extent of the clients' facial injuries.

The final hearing in KAUFMAN's disciplinary action commenced with the Referee's suggestion that the court address KAUFMAN's Trial Brief, which he previously filed with the court, because the BAR's witnesses had not yet arrived (A 20). The BAR also had a copy of KAUFMAN's Trial Brief and was aware of its contents and scope and that it included a motion to dismiss. Since the BAR's witnesses, Carol and Linda Horan, had not yet arrived at the hearing,

the BAR was in complete agreement with proceeding and with the procedure utilized. The BAR voiced no objection or complaint to proceeding with the hearing without its witnesses, and fully participated in the hearing (A 20-A 41). Procedure was never an issue at the hearing below. The proceedings below, therefore, are more accurately viewed as an accommodation to the BAR. The BAR clearly had no cause of action without its witnesses or the necessary lost photographic evidence on which it relied. After hearing the BAR's proffer, the Referee was permitted to make credibility determinations and accept KAUFMAN's version that no wrongdoing occurred.

The BAR now takes the rather unbelievable and inconsistant position that there were procedural irregularities. The BAR asks this Court to reverse on the basis of procedural objection it did not assert below and which it, at the time, indicated was perfectly acceptable. Florida case law is too well established to give any credence to the BAR's procedural arguments which were not urged or preserved below. Simply stated procedural matters not objected to in a lower court cannot be raised on appeal. Allstate Insurance Co. v. Gillespie, 455 So.2d 617 (Fla. 2d DCA 1984); Frank v. Pioneer Metals, Inc., 121 So.2d 685 (Fla. 3d DCA 1960). Procedural irregularities to which no objection is made are waived. Allstate, supra.

The BAR was fully aware that KAUFMAN asserted a motion to dismiss in his Trial Brief when the court suggested the brief be addressed. In addition, the BAR was put on further notice of motions by KAUFMAN's counsel's response to the Court's suggestion that we address your trial brief, when he replied, "I was going to suggest that...we should address it this morning either in the form of my motion to dismiss or an opening statement...", to which the BAR voiced no objection (A 20). The Bar rules provide that the Referee may hear motions at the final hearing. Fla. Bar Rules of Discipline, 3-7.5(g)(4) If the BAR perceived any irregularity in the motions or procedure, it should have objected then.

The BAR now, however, attempts to reverse the holding below by asserting that the motion was not timely filed. In an analogous case in criminal law, the Florida court held that the State waived whatever technical objections it had to the timeliness of a motion to dismiss when the State made its argument for the first time on appeal and never brought it to the trial court's attention. State v. Giardino, 363 So.2d 201 (Fla. 3d DCA 1978).

Furthermore, by failing to object to the procedural irregularity, if any, below the BAR abrogates one of the most fundamental purposes of the rules of procedure. Florida courts have held that the purpose of preserving

error below is to afford the trial court an opportunity to consider the issues in question and correct any error. Unless an litigant urges procedural objections below, an ultimately unsuccessful litigant could present an argument which constitutes no more than a mere appellate afterthought so as to require a new trial, which he could have prevented if he had simply called the matter to the trial court's attention. Corbett v. Dade County Board of Public Instruction, 372 So.2d 971 (Fla. 3d DCA 1979); Florida Rule of Civil Procedure, 1.470(b).

KAUFMAN is faced with a similar situation here. The BAR had no complaint to the procedure as it occurred below and objects now only because it lost.

Furthermore, and more importantly, the BAR misrepresents the scope of the proceedings at the Referee hearing when it states that "(i)n the instant case the complaint was dismissed without the Bar having been able to call a witness." (Bar Brief 9) The Referee in no way prevented the BAR from calling its witnesses. The BAR was not able to call Carol and Linda Horan because they had not appeared for the hearing when the Referee was ready to begin, and did not show up throughout the entire proceeding (A 20). The BAR outlined in detail what Linda and Carol Horan's testimony would be if they did show up for the hearing and indicated that it would be hearsay at best and

would be used to attempt to establish the truth of what the missing best evidence showed. In other words, the BAR intended to have Linda and Carol Horan testify as to what they remembered the photographs looked like four years after they were taken, and after the BAR lost them! Frankly, since the BAR had no witnesses present the case should have been dismissed outright and right then. When the Referee let the BAR make a proffer, he gave the BAR more than they were entitled.

When a party makes no objection to the form of proof taken or made in a proceeding, it cannot later complain on appeal of actions and procedure in which it at least tacitly acquiesced. Frank, supra. By failing to call any witnesses and failing to object to the proceedings below, the BAR has waived any further objections. Allstate and Frank, supra.

In an analagous hearing before a special master, the plaintiff, suing to dissolve a partnership, acquiesced to the procedure and made no objection to the form of proof taken. On appeal, the plaintiff, however, filed extensive exceptions to the special master's report, which included a procedural objection that the special master did not call or notify any of the parties or hold hearings, failed to take or allow testimony, and instead based his decision on an examination of the books and records. The court held that although the special master had not adhered to the required

procedure, the plaintiff could not assign error because he acquiesced to the procedure and failed to object below. Obel v. Henshaw, 130 So.2d 892 (Fla. 3d DCA 1961).

The Referee did not hear Carol and Linda Horan's testimony simply because they were not at the hearing to testify. The BAR did not and presumably could not call them. Had they appeared it would have been within the Referee's discretion to refuse to consider their testimony since the BAR had clearly demonstrated that it intended to elicit from them no more than hearsay as to what the best evidence (the photographs the BAR lost) showed.

The procedure employed at the hearing below was perfectly acceptable. The Referee's findings come to The Supreme Court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986); The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); Fla. Bar Rules of Discipline 3-7.6(c)(5).

The Bar proffered its evidence below. It did not object to the procedure employed in the proceedings, call any witnesses, or ask for a continuance when its witnesses failed to appear. The BAR has not established that the Referee's findings are clearly erroneous or without support in the record. This Court should affirm the Referee's findings.

CONCLUSION

It is undisputed that the BAR's burden here and below is to prove KAUFMAN's guilt by clear and convincing evidence. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987); The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984). It is equally undisputed that the Referee's decision below comes to this Court with a presumption of correctness. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986); The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); Fla. Bar Rules of Discipline, 3-7.6(c)(5). The BAR lost the evidence that it stipulated was "necessary" to the prosecution. The BAR clearly did not meet its "clear and convincing" standard without the evidence it lost and admits is "necessary".

The proffer procedure utilized below was consented to and participated in by the BAR. In fact, the procedure was utilized as a accommodation to the BAR since the BAR's witnesses were not present when the hearing began and never appeared throughout the hearing.

The Referee was permitted to make credibility determinations from the proffer and accept KAUFMAN's version that no wrongdoing had occurred in that the makeup was applied not to enhance the scars but simply to prevent their obliteration by the flash.

It is respectfully submitted that the conclusions of the Referee were correct and should be adopted by this Court.

Respectfully submitted,

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By: L. Edward McClellan, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 30 day of January, 1989, to:

James N. Watson, Jr., Esquire, Bar Counsel, The Florida Bar, Tallahassee, Florida 32301;

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By: L. Edward McClellan, Jr.