IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. SC _____

ASHLEY ANN KRAPACS,
Petitioner

vs.

THE FLORIDA BAR,
Respondent

L.T. Case Nos.: SC19-277;
2018-50,829 (17I)FES;
2018-50, 851 (17I);
2019-50, 081 (17I)

PETITION FOR WRIT OF PROHIBITION

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The Florida Bar's Exhibit A

PETITION FOR WRIT OF PROHIBITION

On July 15, 2019, Ashley Ann Krapacs (hereinafter, "Petitioner") filed a Motion to Dissolve the Emergency Suspension in case No. SC19-277. On July 18, 2019, a hearing on Petitioner's Motion to Dissolve the Emergency Suspension was held before Referee Schosberg Feuer (hereinafter, "Referee"). At that time, Petitioner had already filed one Motion to Disqualify Referee on June 19, 2019. Referee denied that motion just one day later. Petitioner filed her first Writ of Prohibition in this case on July 17, 2019. That same day, Petitioner filed a Motion to Stay the Proceedings. With the Writ of Prohibition and Motion to Stay the Proceedings pending, on July 18, 2019, Petitioner requested a continuance of the hearing on her Motion to Dissolve the Emergency suspension. Petitioner's request was denied.

During the July 18, 2019 hearing, Referee made several comments which were disparaging to Petitioner's position and signaled a prejudgment of the issues before Referee. Referee stated that she had already heard all the evidence in this case at the May 1, 2, and 7, 2019 evidentiary hearing. When Petitioner indicated that she wished to present new and different evidence in support of her Motion to Dissolve, Referee stated that Petitioner had an attorney at the May 1, 2, and 7, 2019 evidentiary hearing and indicated that all evidence should have been

presented then. Referee gave Petitioner just twenty-five minutes to argue her 193-page motion, a motion which contained thirty-three exhibits. Petitioner was deprived of a meaningful evidentiary hearing on her Motion to Dissolve. Referee's indication that she had already heard the evidence in this case and did not wish to consider any more is a clear indication that Referee had prejudged the case and had already made a decision about her ruling. This is further evidenced by the fact that Referee issued her Report and Recommendation that the Motion to Dissolve be denied shortly after the end of the hearing, even though she had seven days from the date of the hearing to draft a full report. In part based upon the events that transpired at the July 18, 2019 hearing, Petitioner filed a second Motion to Disqualify Referee on July 26, 2019. Referee denied the Motion to Disqualify Referee on July 29, 2019.

In addition to the above, the record in this case demonstrates that Referee has made numerous, improper, biased evidentiary rulings which favored The Florida Bar (hereinafter, "The Bar") and damaged Petitioner, resulting in an unfair, imbalanced presentation of the evidence which forms the record in this case. Referee repeatedly allowed the introduction of evidence by The Bar without permitting Petitioner to introduce evidence which would refute and discredit The Bar's evidence. Even more concerning, much of this evidence that Petitioner was

not permitted to rebut or argue against appears in Referee's June 3, 2019 Report & Recommendation and forms the basis for Referee's recommendations in this case. Further, Referee repeatedly permitted The Bar to introduce evidence that was irrelevant, inaccurate, unsubstantiated, and unauthenticated. Also, several times, Referee permitted introduction of evidence that was incomplete and taken out of context to the advantage of The Bar.

I. BASIS FOR INVOKING THIS COURT'S JURISDICTION

This Court has original jurisdiction over this petition under R. Regulating Fla Bar 3-7.7(e), which states, "All applications for extraordinary writs that are concerned with disciplinary proceedings under these rules of discipline shall be made to the Supreme Court of Florida."

II. STATEMENT OF FACTS

1. On February 20, 2019, The Bar filed its Petition for Emergency Suspension against Petitioner.

2. On February 27, 2019, the Florida Supreme Court issued its order granting The Bar's Petition for Emergency Suspension, with two justices dissenting.

3. On March 4, 2019, the Honorable Samantha Schosberg Feuer was appointed as Referee.

4. On May 1, 2, and 7, 2019, an evidentiary hearing was held in this matter.

5. During the evidentiary hearing, Referee made numerous, improper, biased evidentiary rulings which favored The Bar and damaged Petitioner, resulting in an unfair, imbalanced presentation of the evidence which forms the record in this case.

6. During the evidentiary hearing, Referee repeatedly allowed the introduction of evidence by The Bar without permitting Petitioner to introduce evidence which would refute and discredit The Bar's evidence.

7. During the evidentiary hearing, Referee repeatedly permitted The Bar to introduce evidence that was irrelevant, inaccurate, unsubstantiated, and unauthenticated. Also, several times, Referee permitted introduction of evidence that was incomplete and taken out of context to the advantage of The Bar.

8. On June 3, 2019, the Report & Recommendation by Referee was docketed. Much of the evidence that Petitioner was not permitted to rebut or argue against appears in Referee's June 3, 2019 Report & Recommendation and forms the basis for Referee's recommendations in this case.

9. On June 13, 2019, Counsel for Petitioner filed a Motion to Withdraw

as Counsel.

10. On June 14, 2019, The Florida Supreme Court granted the Motion to Withdraw as Counsel.

11. On June 19, 2019, Petitioner filed a Motion to Disqualify Referee.

12. On June 19, 2019, Petitioner filed a Notice of Objections to Referee's Report & Recommendation.

13. On June 20, 2019, Referee denied Petitioner's Motion to Disqualify Referee.

14. On June 24, 2019, this Honorable Court issued a letter indicating that Petitioner's Notice of Objections to Referee's Report & Recommendation would be treated as a Notice of Intent to Seek Review of Report of Referee.

15. On July 9, 2019, The Bar filed its Cross-Notice of Intent to Seek Review of Report of Referee.

16. On July 13, 2019, Petitioner filed a Motion to Dissolve the Emergency Suspension.

17. On July 15, 2019, The Florida Supreme Court issued an order designating The Honorable Krista Marx, Chief Judge of the Fifteenth Judicial Circuit of Florida, to appoint a referee.

18. On July 15, 2019, The Bar filed its Motion to Strike the Motion to

Dissolve the Emergency Suspension, Request for Reconsideration of Order Dated July 15, 2019, and Motion to Stay Order Dated July 15, 2019.

19. On July 16, 2019, The Honorable Krista Marx appointed Judge Schosberg Feuer as Referee.

20. On July 16, 2019, Referee issued an order scheduling a hearing on the Motion to Dissolve the Emergency Suspension for July 18, 2019.

21. On July 17, 2019, Petitioner filed a Writ of Prohibition with the Florida Supreme Court.

22. On July 17, 2019, Petitioner filed a Motion to Stay the Proceedings.

23. On July 17, 2019, The Florida Supreme Court denied The Bar's Motion to Strike the Motion to Dissolve the Emergency Suspension, Request for Reconsideration of Order Dated July 15, 2019, and Motion to Stay Order Dated July 15, 2019.

24. On July 18, 2019, the parties appeared before Referee on Petitioner's Motion to Dissolve the Emergency Suspension. Since the Motion to Stay the Proceedings and the Writ of Prohibition were still pending, Petitioner requested that the hearing be continued. Referee denied Petitioner's request.

25. On July 18, 2019, Referee stated that she had already heard all the evidence in this case at the May 1, 2, and 7, 2019 evidentiary hearing. When

Petitioner indicated that she wished to present new and different evidence in support of her Motion to Dissolve, Referee stated that Petitioner had an attorney at the May 1, 2, and 7, 2019 evidentiary hearing and indicated that all evidence should have been presented then. Referee gave Petitioner just twenty-five minutes to argue her 193-page motion, a motion which contained thirty-three exhibits.

26. On July 18, 2019, shortly after the end of the hearing, Referee issued a Report and Recommendation that the Motion to Dissolve the Emergency Suspension be denied.

27. On July 26, 2019, Petitioner filed a second Motion to Disqualify Referee.

28. On July 29, 2019, Referee denied Petitioner's Motion to Disqualify.

III. NATURE OF RELIEF SOUGHT

Petitioner seeks relief from this Court to remove Referee from these proceedings based on the legal sufficiency of Petitioner's July 26, 2019 Motion to Disqualify Referee, establishing the appearance of impropriety arising out of the bias exhibited against Petitioner and in favor of The Bar during the course of these proceedings.

IV. ARGUMENT

A. Standard of Review

"Appellate court reviews a trial court determination on whether a motion for disqualification is legally sufficient de novo." *Doorbal v. State*, 983 So.2d 464 (Fla. 2008).

B. Applicable Law

The U.S. Supreme Court has held that, "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases." *In re: Murchison*, 349 U.S. 133, 136 (1955). The Florida Rule of Judicial Administration 2.330 provides that any party may move to disqualify the trial judge assigned to the case on the grounds "that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge."

Pursuant to R. Regulating Fla. Bar 3-7.6(h)(8), a referee may be disqualified from service in the same manner and to the same extent that a trial judge may be disqualified under existing law from acting in a judicial capacity.

Florida Statute § 38.10 provides:

> Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the

> substitution of judges for the trial of causes in which the presiding judge is disqualified.

Rules which control the instant quasi-administrative proceedings do not set for a specific deadline within which Petitioner is required to bring a Writ of Prohibition challenging the denial of a Motion to Disqualify Referee. In the absence of specific provisions, Petitioner submits that the intent behind the Rules governing such quasi-administrative disciplinary proceedings is to permit flexibility to bring a Writ of Prohibition directed at the referee at any point prior to a final judgment in the proceedings.

Further, the First District Court of Appeal has held that, "Filing a prohibition petition in an appellate court challenging the denial of a disqualification order—versus raising the issue on appeal after final judgment—need only be done as soon as practicable." *People Against Tax Revenue Mismanagement, Inc.*, 571 So.2d 493, 496 (Fla. 1st DCA 1990). Here, no final judgment has been entered, thus Petitioner need only file her prohibition petition as soon as practicable. Petitioner now timely files this Writ of Prohibition seeking relief from this Honorable Court.

In *Hayes v. State of Florida*, the Fourth District Court of Appeal stated, "Our task on appeal is to determine the legal sufficiency of the motion based on whether the facts alleged would place a reasonably prudent person in fear of not receiving a

fair and impartial trial and sentencing proceeding." *Hayes v. State of Florida*, 686 So.2d 694, 695 (Fla. 4th DCA 1997), quoting *Levine v. State of Florida*, 650 So.2d 666, 667 (Fla. 4th DCA 1995). "[A] party seeking to disqualify a judge need only show 'a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling.'" *Wargo v. Wargo*, 669 So.2d 1123, 1124 (Fla. 4th DCA 1996), quoting *State ex rel. Brown v. Dewell*, 131 Fla. 566, 573 (Fla. 1938). See also *Hayslip v. Douglas*, 400 So.2d 553 (Fla. 4th DCA 1981).

"The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially." *Livingston v. State of Florida*, 441 So.2d 1083, 1086 (Fla. 1983). "A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Id.* at 1087. Here, as argued in Petitioner's July 26, 2019 Motion to Disqualify Referee, the facts of this case clearly demonstrate that the Petitioner has a well-grounded fear that she has not and will not receive a fair consideration of her motions or an impartial trial before Referee.

Petitioner brings the instant motion challenging the impartiality of the

Referee on the following grounds:

i. Referee Prejudged the Issues

The overwhelming evidence in this case demonstrates that Referee improperly prejudged the issues in this case. It is well-settled that disqualification is required when a judge has demonstrated prejudgment of a case. "A judge may form mental impressions and opinions during the course of presentation of evidence, as long as she does not prejudge the case." *Wargo v. Wargo*, 669 So.2d 1123, 1124-1125 (Fla. 4th DCA 1996), quoting *Brown v. Pate*, 577 So.2d 645, 647 (Fla. 1st DCA 1991). See also *Barnett v. Barnett*, 727 So.2d 311, 312 (Fla. 2d DCA 1999); *Wolfson v. Wolfson*, 159 So. 3d 394 (Fla. 3d DCA 2015).

In *Wargo*, which involved post-judgment proceedings in a dissolution of marriage case, the Fourth District Court of Appeal found that "the judge made the gratuitous remarks which were disparaging of husband's position prior to hearing any evidence in the case. Thus, the remarks may have signaled a predisposition, rather than an impression formed after reviewing the evidence." *Wargo*, 669 So.2d at 1125 (Fla. 4th DCA1996).

Further, in *Barnett*, a divorce proceeding, the judge made a statement on the record regarding visitation of the child of the parties, a statement which indicated that the judge had prejudged the issue of visitation of the child before the close of

the evidence. *Barnett*, 727 So.2d at 311 (Fla. 2d DCA 1999). The Second District Court of Appeal granted the Petitioner's Writ of Prohibition and found that the judge's comment "could reasonably be interpreted to mean that the judge had crossed that line from forming mental impressions to prejudging the issue." *Barnett v. Barnett*, 727 So.2d at 312 (Fla. 2d DCA 1999).

Additionally, The Supreme Court of Florida has held, "Judicial comments revealing a determination to rule a particular way prior to hearing any evidence or argument have been found to be sufficient grounds for disqualification." *Thompson v. State*, 990 So.2d 482, 490 (Fla. 2008), quoting *Benson v. Tharpe*, 685 So.2d 1363, 1364 (Fla. 2d DCA 1996). In *Thompson*, the trial judge, before the presentation of evidence, made reference to specific sentencing guidelines that the defendant could face in his criminal case, and the Court held that this demonstrated the judge's predisposition. *Thompson*, 990 So.2d at 490 (Fla. 2008).

In the instant case, during the July 18, 2019 hearing on Petitioner's Motion to Dissolve the Emergency Suspension, Referee made several comments on the record which were disparaging to Petitioner's position and signaled a prejudgment of the issue before Referee. Referee stated that she had already heard all the evidence in this case at the May 1, 2, and 7, 2019 evidentiary hearing. When Petitioner indicated that she wished to present new and different evidence in

support of her Motion to Dissolve, Referee stated that Petitioner had an attorney at the May 1, 2, and 7, 2019 evidentiary hearing and indicated that all evidence should have been presented then.

However, R. Regulating Fla. Bar 3-5.2(g) clearly states that a respondent "may move *at any time* for dissolution or amendment of an emergency order by motion filed with the Supreme Court of Florida" (emphasis added). Petitioner's Motion to Dissolve the Emergency Suspension was therefore timely. R. Regulating Fla. Bar 3-5.2(i) clearly states that a respondent is entitled to a hearing on the motion within seven days of appointment of a referee, and referee must file a report and recommendation within seven days of the hearing held. Nothing in the rules indicates that if a Motion to Dissolve is filed after a separate, different evidentiary hearing has been already been held that a respondent is deprived of their right to a full evidentiary hearing on the Motion to Dissolve. Further, the requirement of a report and recommendation by referee clearly demonstrates the need for a full evidentiary hearing to be held on the issue.

In the instant case, however, Petitioner was deprived of an evidentiary hearing on her Motion to Dissolve. Referee gave Petitioner just twenty-five minutes to argue her 193-page motion, a motion which contained thirty-three exhibits. "The fundamental requirement of due process is the opportunity to be

heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Referee here failed to give Petitioner a meaningful opportunity to present the evidence supporting her motion, in violation of R. Regulating Fla. Bar 3-5.2(i) and in violation of Petitioner's Due Process Rights. Referee's indication that she had already heard the evidence in this case and did not wish to consider any more is a clear indication that Referee had prejudged the case and had already made a decision about her ruling. This is also evidenced by the fact that Referee issued her Report and Recommendation for Denial of the Motion to Dissolve the Emergency Suspension shortly after the end of the hearing, even though she had seven days from the date of the hearing to draft a full report. This sort of treatment is the kind of prejudgment that would instill fear in any reasonable person of not receiving a fair hearing or consideration of motions.

This is not the first instance in which Referee has failed to consider the evidence presented by Petitioner. The record in this case demonstrates that Referee made numerous, improper, biased evidentiary rulings which favored The Bar and damaged Petitioner, resulting in an unfair, imbalanced presentation of the evidence which forms the record in this case. Referee repeatedly allowed the introduction of evidence by The Bar without permitting Petitioner to introduce evidence which

would refute and discredit The Bar's evidence. Even more concerning, much of this evidence that Petitioner was not permitted to rebut or argue against appears in Referee's June 3, 2019 Report & Recommendation and forms the basis for Referee's recommendations in this case. Further, Referee repeatedly permitted The Bar to introduce evidence that was irrelevant, inaccurate, unsubstantiated, and unauthenticated. Also, several times, Referee permitted introduction of evidence that was incomplete and taken out of context to the advantage of The Bar.

In Referee's June 3, 2019 Report & Recommendation, Referee found that The Bar's witness, Russell J. Williams (hereinafter, "Williams") "testified credibly." See Exhibit A, page 24. However, Referee failed to indicate why she found Williams to be credible. Further, Referee completely disregarded and ignored voluminous evidence in the record which demonstrated clearly that Williams is indeed not credible, that he himself committed several violations of the Rules Regulating the Florida Bar, and that he has deep-seeded, self-serving ulterior motives in the attacks he has launched against Petitioner for more than a year and a half. Finding a witness credible and taking their full testimony as the truth without consideration of evidence to the contrary clearly demonstrates that Referee abandoned her role of impartiality, that she prejudged the issues in this case, and that she disregarded evidence that did not conform with her prejudgment.

Additionally, Referee also found that The Bar's witness, Nisha Bacchus (hereinafter, "Bacchus") "testified credibly." See Exhibit A, page 25. Again, Referee failed to explain why she found Bacchus credible and seemed to take Bacchus's full testimony as truth. And again, Referee completely disregarded and ignored voluminous evidence in the record which demonstrated clearly that Bacchus is indeed not credible, that Bacchus has committed several violations of the Rules Regulating the Florida Bar, and that Bacchus, too, has deep-seeded, self-serving ulterior motives in the attacks she has launched against Petitioner for a year.

Not only did Referee fail to consider the evidence that damaged Bacchus's credibility, Referee prevented much of that evidence from even being presented. When Petitioner's witnesses, Leila Campagnuolo (hereinafter, "Campagnuolo") and Judith Mach (hereinafter, "Mach") testified, The Bar repeatedly objected to the questions Petitioner posed to the witnesses that pertained to Bacchus, and Referee repeatedly improperly sustained the objections. Both witnesses are former clients of Bacchus and have firsthand knowledge regarding the credibility of one of The Bar's star witnesses, yet neither was permitted to testify regarding their interactions with Bacchus.

Further, Referee in her June 3, 2019 Report & Recommendation found that

Petitioner was "at times was credible and other times not credible." See Exhibit A, page 27. However, Referee did not provide any supporting information regarding which times she found Petitioner "not credible," nor did she provide any basis for making such a finding. Referee then conveniently disregarded the bulk of Petitioner's testimony and cherry-picked which parts of Petitioner's testimony she wished to include in Referee's June 3, 2019 Report & Recommendation, a clear demonstration that Referee prejudged the issues and chose only to acknowledge parts of Petitioner's testimony which conformed with Referee's prejudgment.

Also, in Referee's June 3, 2019 Report & Recommendation, Referee applied aggravating factor "9.22(f), submission of false evidence, false statements, or other deceptive practices during the disciplinary process – with multiple letters to the Florida Bar, Respondent falsely accused Russell Williams and Nisha Bacchus of conduct that did not occur." See Exhibit A, page 33. The frivolous bar complaints filed by Gregory Knoop and Williams against Petitioner were pending for some eight months before The Bar took any sort of formal action, and Petitioner was required to file voluminous responses to The Bar over that period of time. Despite the sheer volume of correspondence in this case between Petitioner and The Bar, Referee failed in any way to specify which letters or statements she found to be false. Further, all attempts Petitioner made to introduce evidence demonstrating

that all statements she made to The Bar about Bacchus and Williams were truthful were repeatedly objected to by The Bar and sustained by Referee.

In addition to preventing Petitioner from admitting certain evidence and blatantly disregarding much of the evidence that did make it to the record, Referee repeatedly permitted The Bar to introduce evidence that was irrelevant, inaccurate, unsubstantiated, and unauthenticated. The Bar's initial Petition for Emergency Suspension contained a copy of a transcript that was allegedly from the April 12, 2018 hearing that Petitioner had attended in the domestic violence injunction case she had filed against Gregory Knoop. The transcript used by The Bar was in fact not the official transcript, but was an inaccurate, unofficial version provided to The Bar by Williams. Despite objections by Petitioner, Referee permitted introduction of the incorrect, unofficial transcript and completely disregarded the official, correct version, even though Petitioner attempted to enter it into evidence during the May 2019 evidentiary hearing.

Additionally, The Bar's Petition for Emergency Suspension contained a transcript of a YouTube video. The transcript contained numerous very serious errors. Counsel for Petitioner objected to the introduction of this evidence at the evidentiary hearing, as the transcript contained many serious inaccuracies. Referee did not rule on this objection during the evidentiary hearing, but still considered

this evidence in her June 3, 2019 Report & Recommendation and quoted from the transcript, despite Petitioner's insistence that the transcript was not properly authenticated and was grossly inaccurate.

Several times, Referee permitted introduction of evidence that was incomplete and taken out of context to the advantage of The Bar, in an apparent effort to allow introduction of evidence that conformed with Referee's prejudgment. The Bar alleged that Petitioner had posted a picture of a "shotgun" on social media. No evidence of this is contained anywhere within the record. Referee prevented Petitioner from introducing evidence that would unequivocally demonstrate that Petitioner never at any point posted a picture containing a "shotgun." Deeply concerning is that, despite that absolutely no evidence that Petitioner has ever posted a photo of a shotgun exists, and despite that Referee prevented Petitioner from entering evidence to the contrary, Referee stated in her June 3, 2019 Report & Recommendation that Petitioner posted a photo of a "shotgun." See Exhibit A, page 18. It is obvious that Referee's rulings on evidence were made solely to conform with Referee's improper prejudgment of the case.

Additionally, Referee considered evidence of one particular social media post in which Petitioner wrote about a Request to Produce that Bacchus had served on Petitioner in the defamation case that Williams had filed against Petitioner.

Referee refused to allow Petitioner to introduce evidence regarding the full content of that post and the full context of what the Request to Produce contained. Despite her refusal to permit Petitioner to introduce such evidence (namely, that Bacchus required Petitioner to provide evidence that her father is deceased, a matter which was entirely irrelevant to the defamation case and nothing more than inflammatory harassment), Referee, in her June 3, 2019 Report & Recommendation, quoted the portion of that post that was incomplete and taken out of context. See Exhibit A, page 22.

Additionally, The Bar introduced evidence of text messages between Petitioner and Gregory Knoop. The segments of text messages introduced into evidence by The Bar over Petitioner's objection were irrelevant, incomplete, taken out of context, and unauthenticated. Despite Petitioner's objections to introduction of the text messages, Referee permitted the text messages to be introduced, and Referee quoted from the messages in her June 3, 2019 Report & Recommendation. See Exhibit A, page 35.

The facts clearly demonstrate that Referee improperly prejudged the issues in this case and, thus, Petitioner has a reasonable fear that she has not and will not receive a fair consideration of her motions or a fair and impartial trial in these proceedings. For the foregoing reasons, disqualification of Referee and

reappointment of a new referee is necessary.

ii. Referee Engaged in Ex Parte Communications

The evidence in this case demonstrates that Referee engaged in improper ex parte communications with The Bar. The Code of Judicial Conduct in Canon 3B(7) states that:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

. . . .

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Fla. Code Jud. Conduct, Cannon 3B(7). The commentary in Canon 3B(7) clearly states: "the proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted." Fla. Code Jud. Conduct, Cannon 3B(7) cmt.

Further, Black's Law Dictionary defines "ex parte" as follows: "On one side

only; by or for one party; done for, in behalf of, or on the application of, one party only. A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to ***or*** contestation by, any person adversely interested." *Black's Law Dictionary Free* (2nd ed. 2019) (emphasis added). Thus, an order can be correctly characterized as ex parte if it is entered with notice, but without contestation by an adversely affected party.

In the instant case, the Bar made an allegation against Petitioner in case No. SC19-277 that Petitioner posted a photo of a "shotgun" on social media. See Exhibit B, page 20. That allegation was affirmed by Referee without consideration of the evidence in the record in the case and without permitting Petitioner to introduce evidence that indisputably demonstrated this allegation against Petitioner was patently false. Thus, the ruling made by Referee was made only for the benefit of one party, The Bar, without an opportunity for contestation by the adversely interested party, Petitioner. This communication therefore was ex parte.

"It is because of its effect on the appearance of impartiality that an allegation of an ex parte communication is legally sufficient to require recusal." *Pearson v. Pearson*, 870 So.2d 248 (Fla. 2d DCA 2004), quoting *Robbins v. Robbins*, 742 So.2d 395 (Fla. 2d DCA 1999). "A trial judge's decision must be overturned when

'the appellate court cannot determine if the trial judge's actions were harmless because the trial court's order was based on communications outside the record.'" *Albert v. Rogers*, 57 So. 3d 233, 236 (Fla. 4th DCA 2011), quoting *Wilson v. Armstrong*, 686 So. 2d 647, 648-49 (Fla. 1st DCA 1996).

Here, Referee received information outside the scope of evidence in this case which she ultimately used to form the basis of her June 3, 2019 Report & Recommendation. The Bar's initial Petition for Emergency Suspension contained an allegation that Petitioner had posted a photo of a "shotgun." See Exhibit B, page 20. The information in The Bar's petition contained merely allegations which The Bar was required to prove through evidence at the evidentiary hearing. Absolutely no evidence that Petitioner posted a photo of a "shotgun" is contained within the record, yet this unsubstantiated allegation appears in Referee's June 3, 2019 Report & Recommendation. See Exhibit A, page 18. Referee's acceptance of allegations which are not supported by the evidence in this case constitute improper ex parte communications between Referee and The Bar since Referee's June 3, 2019 Report & Recommendation was clearly based only on information provided to Referee in The Bar's initial petition and is not in any way supported by the evidence in this case.

"Nothing is more dangerous and destructive of the impartiality of the

judiciary than a one-sided communication between a judge and a single litigant." *Rose v. State*, 601 So.2d 1181, 1183 (Fla., 1992). Referee's use of The Bar's petition language, without any supporting evidence, clearly demonstrates a one-sided communication between Referee and The Bar. Nothing is more dangerous and destructive to the impartiality of the judiciary than this one-sided exchange between Referee and The Bar which helps form the basis of Referee's ruling. A Referee accepting the allegation of The Bar in a disciplinary case at face value, particularly when no evidence exists in the record to substantiate the allegation, is akin to a trial judge in a criminal case accepting a prosecutor's charging documents at face value with complete disregard to the record of evidence. Clearly, such conduct constitutes a gross miscarriage of justice.

For the foregoing reasons, the Petitioner has a reasonable fear that Referee improperly engaged in ex parte communications and that Petitioner has not and will not receive a fair consideration of her motions or a fair and impartial trial before the Referee, and as such, disqualification and reappointment of a new referee is warranted in this case.

V. CONCLUSION

Based on the foregoing, any reasonably prudent person would have a well-grounded fear that, based on the Referee's comments and conduct signaling her predisposition and prejudgment of the case, Referee did not provide a fair hearing

to Petitioner. Further, based upon Referee's affirmation of an unsubstantiated allegation made by The Bar which constitutes improper ex parte communication, any reasonable prudent person would have a well-grounded fear that Referee has not provided a fair hearing to Petitioner.

WHEREFORE, Petitioner respectfully requests that this Court grant the Writ of Prohibition, remand this matter for assignment of a new referee, and grant any other and further relief this Court deems just and proper.

Date: August 5, 2019

Respectfully,

/s/ Ashley Krapacs
Ashley Ann Krapacs
PO Box 21665
Fort Lauderdale, FL 33335
Phone: 202-341-1509
Email: KrapacsAA@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 5, 2019, a true and correct copy of the Writ of Prohibition was served to the Clerk of Court via Florida's e-Filing portal and via e-mail to: The Honorable Samantha Schosberg Feuer via her judicial assistant at SJohnson1@pbcgov.org (Referee); Randi Klayman Lazarus, Esq., Bar Counsel, The Florida Bar, Lakeview Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323, (rlazarus@floridabar.org, mcasco@floridabar.org); and Allison Carden Sackett, Esq., Substitute Counsel, The Florida Bar, Lakeview Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323, (asackett@floridabar.org).

By: *Ashley Ann Krapacs*
Ashley Ann Krapacs