IN THE SUPREME COURT OF FLORIDA

Supreme Court Case Nos. SC16-1006 and SC16-1009

THE FLORIDA BAR,

Complainant,

vs.

STEVEN KENT HUNTER and PHILIP MAURICE GERSON,

Respondents.

RESPONDENT PHILIP GERSON'S CROSS-REPLY BRIEF IN SUPPORT OF CROSS-NOTICE FOR REVIEW OF REPORT OF REFEREE

On Review from the Report of Referee, Honorable Michael A. Hanzman

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
David C. Pollack
Florida Bar Number 362972
Farah R. Bridges
Florida Bar Number 056861
Attorneys for Respondent Philip Gerson
150 West Flagler Street
Suite 2200
Miami, Florida 33130
(305) 789-3200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

The Florida Bar's Reply Brief and Answer Brief ("Reply Br.") reads as if the record closed with this Court's opinion in *Young v. Achenbauch*, 136 So. 3d 575 (Fla. 2014). It is rife with statements that ignore Judge Hanzman's Report of Referee ("ROR"), which carefully parsed the record of the trial of this disciplinary proceeding, and it misinterprets the law applicable thereto. It is no small wonder that its principal conclusion − that Mr. Gerson's "misconduct" warrants a suspension (Reply Br. 1) − is unsupported by the record or the law.

ARGUMENT

I. GERSON DID NOT VIOLATE RULE 4-1.7 BECAUSE HIS REPRESENTATION OF CERTAIN PETITIONERS WAS NOT DIRECTLY ADVERSE TO WAERNESS OR SPURGEON.

Whether Mr. Gerson violated the current-client conflict Rule comes down to one question: was his representation of petitioning flight attendants "directly adverse" to Raiti Waerness or Peggy Spurgeon, whom he then represented in *Broin* progeny cases. R. Regulating Fla. Bar 4-1.7(a)(1). With all due respect to the Referee, his conclusion that Mr. Gerson's representation of petitioning flight attendants was directly adverse to Ms. Waerness and Ms. Spurgeon was wrong.

The Referee concluded that the Petition could have had a direct adverse impact on Mr. Gerson's two clients because they had "a direct interest in the operation of FAMRI − a Foundation established pursuant to the terms of the

settlement of a case where they were parties . . . ." ROR 45-46. That interest − the hope that FAMRI's expenditure of the $300 million with which it was established would support research on the early detection and cure of the maladies associated with the inhalation of cigarette smoke − is not sufficient to establish that Mr. Gerson's representation of petitioning flight attendants was directly adverse to Spurgeon or Waerness.

The Comment to Rule 4-1.7 explains that a lawyer's duty of loyalty generally precludes her or him from taking on a matter directly adverse to a current client's "interests." "Interests" are "the legal rights and duties of the two clients vis-à-vis one another." American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Op. 05-437, at 1201:155 (Dec. 8, 2004) (ABA Op. 05-434). Direct adversity exists when an attorney's "current representation" causes "**actual[ ] harm[ ]**" or "**legal, financial, or other identifiable detriment**" to another client's interests. *Simpson Performance Prods., Inc. v. Robert W. Horn, P.C.*, 92 P.3d 283, 288 (Wy. 2004) (emphasis added). The harm must be concrete and also must be imminent; it cannot be speculative or a remote possibility. *See* R. Regulating Fla. Bar 4-1.7(a)(1) ("[A] lawyer must not represent a client if [ ] the representation of 1 client **will be** directly adverse to another client[.]") (emphasis added); *see also Simpson*, 92 P.3d at 288 (refusing "to speculate as to the possible effects, adverse or otherwise, that

[attorney's] representation of [client] may have had, or could have, on [former client].")[1]

There is a true dichotomy reflected in the Referee's Report. At the same time that he found that Mr. Gerson's representation of the petitioning flight attendants was directly adverse to the interests of Waerness and Spurgeon, the Referee also found:

> ***[S]uccess on the claims advanced in the Petition could not have possibly caused any class member*** (other than Blissard or Young) ***financial or legal harm even if, in a worst case scenario, FAMRI had been totally dismantled.[2] Thus, any "adverse interest" these flight attendants might have possessed was remote and speculative at best***.

ROR 53 (emphasis added.)

The Referee's language quoted above totally undermines The Bar's argument that if FAMRI were dismantled it "would have adversely impacted Waerness and Spurgeon's legally-cognizable interest in FAMRI's continued existence." Reply Br. 2-4. To the contrary, as the Referee expressly recognized, Waerness's and Spurgeon's desire that FAMRI continue to fund research into

---

[1] *See also* cases cited in Gerson Br. 39 n.12.

[2] The lawyers who signed the Petition were hoping for the distribution of a portion of FAMRI's corpus to the petitioning flight attendants. The Referee found that the Petition's request to disburse "the settlement funds" might have been due to an "inadvertent drafting" error. ROR 20-21.

diseases caused by inhaling tobacco smoke is insufficiently tangible to amount to the direct adversity necessary to establish a conflict. Moreover, the Referee found that "[t]he Petition ***could*** have resulted in FAMRI's demise," thereby impacting Waerness's and Spurgeon's "direct interest in the operation of FAMRI[.]" (emphasis added). ROR 21, 45. That possibility does not create a conflict. Rule 4-1.7(a)(1) prohibits a lawyer from taking on a representation that "***will be*** directly adverse to another client[.]" (emphasis added).

The Bar's companion argument, that the Petition could have led to the rescission of the *Broin* settlement agreement (Reply Br. 3-5), is demonstrably untrue; nothing in the Settlement Agreement would have allowed that outcome.

The tobacco companies insisted on certain provisions in the *Broin* settlement agreement that would have enabled them to rescind under the following circumstances only:

> If the Court ***fails to approve*** this Settlement Agreement or any part hereof, ***or if such approval is modified or set aside on appeal***, ***or if the Court does not enter the final judgment as provided*** for in paragraph 5, ***or if*** the Court enters the final judgment and appellate review is sought, and on such review, ***such final judgment is not affirmed***, then this Settlement Agreement shall be canceled and terminated, and shall become null and void, and the parties shall be restored to their original positions.

TE 1 ¶ 16 (emphasis added).

None of that happened. The trial court approved the settlement agreement; that approval was not set aside or modified on appeal; the trial court entered the agreed final judgment; and it was affirmed. Thereafter, the tobacco companies did not have the right to terminate the Settlement Agreement if the trial court were ever to modify it, including in the ways sought in the Petition.[3]

II. THE REFEREE CORRECTLY APPLIED *YOUNG* TO FIND THAT RULE 4-1.9 IS INAPPLICABLE TO GERSON.

Rule 4-1.9 is inapplicable because, at the time of the alleged violations, Gerson's clients were current clients for purposes of analyzing whether he had a conflict. *Young v. Achenbauch* adopted the "hot potato" rule, holding that "a lawyer or law firm may not simply [choose] to drop one client 'like a hot potato' in order to treat it as though it were a former client for the purpose of resolving a conflict of interest dispute." 136 So. 3d at 581 (citation omitted). That is, a lawyer may not avoid the application of Rule 4-1.7 "by taking on representation in which a conflict of interest already exists and then convert a current client into a former client by withdrawing from the client's case." *Id*.

[3] The Bar tries to bootstrap an argument that the tobacco companies could have sought rescission by noting that Phillip Morris filed an opposition to the relief sought in the Petition and asking the question "why would Phillip Morris have responded" in that way if rescission were not available? *See* Reply Br. 4. Trying to answer the question why Phillip Morris filed what it filed would be an idle exercise, but rescinding the Settlement Agreement is not among the feasible answers. Phillip Morris's filing did not mention rescission, and the Settlement Agreement would not have permitted it in any event.

Hence, *Young* requires that Waerness and Spurgeon be treated as Gerson's current clients for determining whether he had a conflict. The Bar contends that Waerness and Spurgeon should be treated as both current and former clients and that what Gerson did – represent petitioning flight attendants – should be analyzed under both the current client conflict Rule and the former client conflict Rule.

That outcome would be illogical, as the Referee found in rejecting it. Applying *Young*, the Referee concluded that "the same person cannot be both a 'current' and 'former' client for purposes of analyzing whether one act by counsel," representing petitioning flight attendants, could result in two separate violations. To the contrary, Waerness and Spurgeon "were either 'current' clients or not 'clients' at all, and if they were 'current' clients they could not be converted to 'former' clients by Gerson's . . . withdrawal. *Young, supra*." ROR 36.[4]

III. EVEN IF RULE 4-1.9 APPLIED, THE PETITION WAS NOT SUBSTANTIALLY RELATED TO THE PROGENY SUITS.

Even if the former client conflict Rule were applicable, The Bar did not prove that Gerson violated it. Rule 4-1.9 provides, in material part:

[4] We realize that *Young* reinstated the trial court's ruling that Gerson violated Rules 4-1.7 and 4-1.9, but *Young*'s discussion of Rule 4-1.9 did not address the effect of the hot potato rule. *See* 136 So. 3d at 582-583. *Young* also noted that the standard of review of a disqualification order is abuse of discretion and that the reviewing court will not disturb the trial court's express or implied findings if there is substantial competent evidence to support them. *Id*. at 581. Hence, we respectfully suggest that this Court has not previously directly addressed this issue.

> A lawyer who has formerly represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter in which that person's interests are materially adverse[5] to the interests of the former client unless the former client consents after consultation.

The Comment to the Rule clarifies that:

> [m]atters are 'substantially related' for purposes of [Rule 4-1.9] if they involve the ***same . . . legal dispute***, ***or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client***.

The Petition was not substantially related to the progeny suits because they were not the same "legal dispute." Moreover, nothing in the Petition or the proceedings related to it attacked the work Gerson did for Waerness or Spurgeon.

The Bar's analysis distills down to this syllogism: the Petition grew out of the Settlement Agreement and the bodily injury suits grew out of the Settlement Agreement, therefore the Petition and the bodily injury suits are substantially related. That is the wrong conclusion to draw. At best, the syllogism leads to the conclusion that the Settlement Agreement, the progeny suits, and the Petition are generally related, but it elides rather than examines the key issue of whether the Petition and the progeny suits were the same or substantially related.

---

[5] The principles in Rule 4-1.7 determine whether the interests of the present and former client are materially adverse. Cmt. to R. Regulating Fla. Bar 4-1.9(a). For the reasons discussed in Section I, *supra*, and Section II in Gerson's Answer Brief, the Petition was not directly or materially adverse to Waerness or Spurgeon.

They weren't. The Petition asked the court to enforce the settlement, to direct an accounting, and to distribute FAMRI funds to the injured class members who had filed progeny suits. The progeny suits sought compensatory money damages from tobacco companies for adverse health effects that the plaintiffs contended (largely unsuccessfully) were caused by the inhalation of second-hand cigarette smoke.

The Bar misplaces reliance on *Florida Realty Inc. v. General Development Corporation*, 459 F. Supp. 781 (S.D. Fla. 1978). In *Florida Realty*, Florida Realty entered into an agreement to sell home sites owned by General Development Corporation ("GDC") in Missouri. While that agreement was being performed, the Missouri Uniform Securities Act was amended in a way that arguably covered the sale of home sites and the Securities Commissioner demanded that Florida Realty and GDC register. Lawyer Miller filed a lawsuit on Florida Realty's behalf against the Commissioner. GDC paid as much as half of Miller's fees, and also hired Miller directly to register land parcels under the Missouri Securities Act.

Florida Realty lost the securities case. Miller then filed a breach of contract suit for Florida Realty against GDC in Missouri state court. The suit was removed and transferred to the Southern District of Florida with GDC's motion to disqualify Miller pending. The court granted the disqualification motion finding, unsurprisingly, that Florida Realty's Missouri securities suit was substantially

related to its suit against GDC.

> [T]he facts of the two cases are clearly intertwined. The question of what agreements were made between the parties as they launched their challenge against the Missouri Securities Commissioner is central to this litigation.

Id. at 784.

By contrast, the progeny suits were generally related to the Petition (as The Bar observes, both were related to the Settlement Agreement), but nothing in those suits was central to the outcome of the Petition. The success or not of the Petition did not depend on the evidence introduced in the progeny cases. In fact, in *Broin v. Phillip Morris*, the Third District found that the Petition was not substantially related to the progeny cases because it involved a distinct and unrelated issue. 84 So. 3d 1107, 1112 (Fla. 3d DCA 2012).

State Farm Mutual Automobile Insurance Company v. K.A.W., 575 So. 2d 630 (Fla. 1991) is equally unavailing to The Bar. There, a law firm was disqualified from representing a mother and daughter in an action arising out of an automobile collision in which the father was the driver. The law firm had initially represented all three in a personal injury action, but the father later discharged the law firm after it determined that the father may have been contributorily negligent. The mother and daughter subsequently added the father as a defendant. The court disqualified the law firm because it had previously represented the father in the

same personal injury action and continued to represent the whole family in a separate medical malpractice action. *See id.* at 634. Unlike the personal injury action in *K.A.W.*, the Petition and the progeny suits are separate, different actions.

IV. GERSON'S CONDUCT DOES NOT WARRANT DISCIPLINE.

Even if this Court were to uphold the Referee's finding that Gerson violated Rule 4-1.7, it should exercise its discretion not to discipline him. As the Referee wrote:

> [T]the question of whether the Petition and the individual personal injury lawsuits were "substantially related" . . . was clearly debatable . . . [and] by no means open and shut. In fact the Third District concluded that the matters were not "substantially related" because each case involved totally distinct legal and factual issues.
>
> . . .
>
> Also fairly debatable was the question whether the Petition sought any relief "directly adverse" to those objecting class members who were *not* members of FAMRI's board. . . . [T]he law addressing the question of when a particular course of action will be deemed "directly adverse" to a client's interests is far from well-developed. . . . [T]his Court could not locate [ ] a single Florida appellate case that even discusses this issue.

ROR 51-52 (emphasis in original). Inexplicably, The Bar disregards the Referee's scholarly analysis in favor of arguing, incorrectly, that "the existence of the conflict was not open to serious debate" and that "the law on the issue was far from unresolved." Reply Br. 10-11.

Gerson researched the conflict issue and came to the reasonable conclusion

that he could withdraw from representing Waerness and Spurgeon thereby converting them to former clients and thus proceed with the Petition without violating Rule 4-1.9. TR I 104-106, 109-110. This Court disagreed in the motion-to-disqualify context, *Young*, 136 So. 3d at 582, but the decision whether to impose discipline for the conflict is determined under an entirely different standard.

Because Gerson acted in accordance with a reasoned decision on a highly-debatable issue, discipline is not warranted. *See Arden v. State Bar of Cal.*, 341 P.2d 6, 11 (Cal. 1959).[6] Not surprisingly, given this unsettled law, two grievance committees found no probable cause to believe that Gerson violated the conflict Rules, *see* TE 42-43, 59, 67-68, and the Third District reversed the trial court's disqualification order, in part because it found that the Petition was not substantially related to the progeny cases. *Broin*, 84 So. 3d at 1112.

V. IF THE COURT WERE TO DECIDE THAT DISCIPLINE IS WARRANTED, IT SHOULD CONFIRM THE REFEREE'S RECOMMENDATION OF ADMONISHMENT.

If this Court were to impose discipline, the Referee's recommended sanction of admonishment would be appropriate. This recommended sanction has a reasonable basis in existing caselaw and in the Florida Standards for Imposing Lawyer Sanctions. The Bar's argument that Gerson was not negligent because the conflicts were "obvious" and "the potential injury was far from little or

[6] *See also* cases and authorities cited in Gerson Br. 41.

nonexistent," Reply Br. 12, ignores the record evidence and the Referee's factual findings.

An admonishment is an appropriate sanction for a negligent conflicts determination that results in "little or no injury or potential injury to a client." At worst, Gerson's conclusion that he could resign from representing Spurgeon and Waerness and represent petitioning flight attendants without a conflict was negligent.

Before reaching his conclusion, Gerson researched the situation and consulted with his colleagues and other well-regarded attorneys. *See* TR I 104-106, 109-10. Moreover, Gerson was in an unsettled area of the law, as the Referee acknowledged. ROR 51-52. Because Gerson confronted unsettled conflict issues, his reasoned determination was, at worst, negligent. Hence, Gerson did not fail "to heed a substantial risk" of a conflict but, rather, exercised due care that "a reasonable lawyer would exercise in the situation." Florida's Standards for Imposing Lawyer Sanctions, Section III, A., Definitions.

Second, Gerson's reasoned conclusion did not cause Waerness or Spurgeon any actual or potential injury. The Bar contends that the Petition "could have disrupted or ended the research and screenings funded by FAMRI," Reply Br. 12, but fails to identify any actual or potential harm to Waerness's and Spurgeon's financial or legal interests. And once again, The Bar ignores the Referee, who

found that the Petition could not have "directly impact[ed] [Waerness or Spurgeon] financially or legally." ROR 43.

In requesting a 30-day suspension, the Bar places great reliance on the "aggravating factor" of Gerson's not having expressed remorse for his conduct. The Bar attempts to buttress that reliance with one last, futile assertion that "[t]he conflicts were obvious and the application of the rules of Professional Conduct were clear." Reply Br. 13.

If that were true, Judge Hanzman would not have written that the critical areas of conflict jurisprudence were "unsettled," "clearly debatable," "by no means open and shut," "fairly debatable," and the like. *See, e.g.*, ROR 51-52. Nor would he have recommended admonishment if the conflict law was as The Bar falsely portrays it.

Relying on *The Florida Bar v. Germain*, 957 So. 2d 613, 622 (Fla. 2007), The Bar argues that Gerson's lack of remorse may be considered in aggravation because Gerson disputes a conclusion of law (violation of Rule 4-1.7), not findings of fact. But Germain's refusal to express remorse was held against him because "with a minimum of legal research, Germain could have discovered that his conduct did constitute unethical conduct," 957 So. 2d at 622. Moreover, Gerson does dispute the Referee's central factual finding the Petition could have dismantled FAMRI or undone the benefits provided to class members in the

Settlement Agreement. *Compare* TR I 138-140 *with* ROR 46.

That is the polar opposite of the circumstance before this Court. Gerson did the research that Germain failed to do. The Referee found that his conclusion was reasonable in a field of law in which there were no clear precedents. Gerson continues to believe that the facts do not support the violation. According to *Germain*, "it is improper for a referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct" where a lawyer disputes "the factual findings" that he or she engaged in unethical conduct." 957 So. 2d at 622. It would be hypocritical for Gerson to have to claim remorse to avoid the "no remorse" aggravating factor, and perverse for that factor to be applied in determining what discipline is appropriate.

Finally, The Bar's Reply Brief does not distinguish any of the cases that Gerson cited in support of admonishment,[7] but notes that they are "decades old," Reply Br. 15, as if the precedential value of this Court's decisions diminishes with age. Moreover, The Bar's reliance on *The Florida Bar v. Marke*, 669 So. 2d 247 (Fla. 1996) in support of suspension is misplaced. Not only does The Bar concede that the "specific facts" in *Marke* "differ from the instant proceedings," Reply Br. 15, but the conflicts in *Marke* were textbook examples, and Marke was guilty of a "pattern of misconduct." 669 So. 2d at 249.

[7] *See* cases cited in Gerson Br. 50-51.

CONCLUSION

For the reasons and upon the authorities presented here and in Gerson's Answer Brief, this Court should accept the Referee's finding that Gerson did not violate Rule 4-1.9; reject the Referee's finding that Gerson violated Rule 4-1.7 and find that he did not; reject the Referee's recommended discipline of admonishment and find that disciplining Gerson would not be appropriate in the circumstances; and enter such other relief as it deems just and proper.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is submitted in Times New Roman 14-point font.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Attorneys for Respondent Philip Gerson
150 West Flagler Street
Suite 2200
Miami, Florida 33130
Telephone (305) 789-3200

/s/*David C. Pollack*
David C. Pollack
Florida Bar Number 362972
Farah R. Bridges
Florida Bar Number 056861

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2017, I filed a true and correct copy of the foregoing document with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida through the E-filing Portal. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List via e-mail.

Thomas Allen Kroeger Bar Counsel The Florida Bar Miami Branch Office 444 Brickell Avenue, Suite M-100 Miami, Florida 33131-2404 tkroeger@flabar.org abowden@flabar.org	John A. Weiss, Esq. Rumberger Kirk & Caldwell 101 North Monroe Street Suite 120 Tallahassee, FL 32301 jweiss@rumberger.com
Adria E. Quintela The Florida Bar Lakeshore Plaza II, Suite 130 1300 Concord Terrace Sunrise, Florida 33323 aquintel@flabar.org	Steven Hunter Hunter & Lynch, PA 6915 Red Road, Suite 208 Coral Gables, FL 33143 shunter@hunterlynchlaw.com lmartinez@hunterlynchlaw.com

/s/*David C. Pollack*
David C. Pollack