IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEVEN KENT HUNTER
and
PHILLIP MAURICE GERSON,

Respondents.
_____/

Supreme Court Case
Nos. SC16-1006 and SC16-1009
The Florida Bar File
Nos. 2014-70,728(11C)
2014-70,729(11C)

REPORT OF REFEREE

I. Introduction and Procedural History

Complainant, The Florida Bar ("Bar"), accuses Respondents Steven Kent Hunter ("Hunter") and Phillip Maurice Gerson ("Gerson") of violating Rules 4-1.7 and 4-1.9 of the rules regulating its members. According to the Bar these violations occurred when Respondents, together with five other attorneys,[1] filed a "Petition to Enforce and Administer Mandate" ("Petition"), seeking relief adverse to the "Flight Attendant Medical Research Institute" ("FAMRI"), a non-for-profit foundation established pursuant to the settlement of a class action suit brought against several tobacco companies on behalf of flight attendants exposed to smoke in airline cabins. *See Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994)

[1] Phillip Freiden, Esquire, H.T. Smith, Esquire, Hector Lombana, Esquire, Ramon Abadin, Esquire, and Alejandro (Alex) Alvarez, Esquire.

("*Broin* litigation"). In the Bar's view the prosecution of the Petition violated Rules 4-1.7 and 4-1.9 because: (a) certain class members – who Respondents represented (or formerly represented) – had either objected to the filing or not given informed consent; and (b) the Petition sought relief materially and directly adverse to their interests.

While Respondents forcefully deny these charges this case – like many brought by the Bar – is far from nascent, arriving with a highly unusual, lengthy and tangled history. Approximately six months after the Petition was filed two class members (Patricia Young and Alani Blissard) who served on FAMRI's Board of Trustees filed a Motion to Disqualify Respondents, as well as their co-counsel. The Motion to Disqualify insisted that the relief being sought was "materially adverse and prejudicial" to the interests of named and unnamed class members, and that they – as well as other class members – had objected to counsel advancing the claim. Trial Exhibit ("TE") 19, ¶ 1. After considering supporting and opposing affidavits, including declarations filed by Respondents, the trial court (Bagley, J.) granted the Motion to Disqualify, finding that Respondents (and the other attorneys who filed or joined the Petition) possessed a conflict of interest, and that their representation was thus precluded by Rules 4-1.7 and 4-1.9.[2]

[2] The trial court found that Gerson, Hunter and Alvarez had a direct conflict of interest with current and former clients and that this conflict was imputed to their co-counsel, Freiden, Lombana, Smith and Abadin. TE-33, p. 4.

Dissatisfied with that ruling Gerson and Hunter filed a petition for certiorari in the Third District Court of Appeal.[3] Quashing the disqualification order, the Third District first observed that: (a) the case presented "a common dilemma" that often arises when class counsel undertake a course of action approved by "a significant number" of class members despite the objection of others; and (b) Florida's Rules of Professional Conduct did not adequately address "conflict of interest problems typical to class action cases." *Broin v. Phillip Morris Companies, Inc.*, 84 So. 3d 1107, 1112 (Fla. 3d DCA 2012). The court therefore chose to adopt a balancing test used by federal courts, and held that "before disqualifying a class member's attorney on the motion of another class member, the court should balance the actual prejudice to the objector with his or her opponent's interest in continued representation by experienced counsel." *Id.*

Employing this balancing test the Third District concluded that the class members' right to be represented by Gerson and Hunter outweighed any possible prejudice to the movants, particularly given the fact that these attorneys were not lead counsel in the original class action and, as a result, possessed "little access to confidential information." *Id.* The Third District also found that although the Petition arose out of the prior tort case the issues presented were distinct and

[3] The other disqualified attorneys did not seek appellate review.

unrelated. For these reasons the Third District concluded that the trial court had departed from the essential requirements of law in disqualifying Respondents.[4]

Dissatisfied with the Third District's decision Young, Blissard and FAMRI sought review in the Supreme Court of Florida which accepted jurisdiction and quashed the intermediate appellate court's decision. *Young v. Achenbauch*, 136 So. 3d 575 (Fla. 2014). The Supreme Court rejected the Third District's use of the balancing test employed by federal courts and held that: (a) "Florida Rules of Professional Conduct provide the standard for determining whether counsel should be disqualified in a given case"; and (b) "the Third District lacked the constitutional authority to adopt a new test." *Id.* at p. 581. The Supreme Court then concluded that the trial court had not abused its discretion "when ruling that counsel violated Florida Rules of Professional Conduct 4-1.7 and 4-1.9." *Id.*

But the *Young* court did far more than just hold that the Third District had applied the wrong legal standard, and that the trial court had not abused its discretion. The Supreme Court opined that the "conflict of interest" asserted by the former class

[4] After entry of Judge Bagley's disqualification order the Bar investigated, and referred to a grievance committee, complaints against Hunter, Gerson and Alvarez which alleged, among other things, that each violated Rules 4-1.7 and 4-1.9 by pursuing the Petition. TE-40. On March 15, 2012 Grievance Committee F of the Seventeenth Judicial Circuit notified all three attorneys that it "found no probable cause for disciplinary proceedings." TE-42, 43. The Bar elected not to further pursue the matter. Respondents do not argue that the Bar's second investigation and resulting complaints are barred by the doctrine of *res judicata* based on the no probable cause finding – and the Bar's failure to challenge that finding – in the prior 17th Judicial Circuit investigation. *See, e.g., The Florida Bar v. Rodriguez*, 959 So. 2d 150 (Fla. 2007) (analyzing previous and current disqualification proceedings and concluding that certain claims were precluded by *res judicata* while others were not).

members "existed long before Gerson and Hunter undertook the litigation against FAMRI and should have been apparent to both" of them. *Id.* at p. 582. Hunter's conflict should have been "evident the moment the idea of suing FAMRI was first raised, because he had represented Blissard, who is a member of FAMRI's board..., and the petition against FAMRI accuses the board (including Blissard) of misusing funds." *Id.* As a result, the action against FAMRI's board was "directly adverse" to Blissard's interests in her capacity as a Board member, yet Hunter did not "even seek out" her consent. *Id.* Rather she "independently learned of the plan to file a petition against FAMRI and contacted Hunter directly to express her objections." *Id.* The Supreme Court concluded that Hunter "had a duty under rule 4–1.7 to decline to pursue the petition against FAMRI, and his withdrawal as Blissard's counsel after the fact did not resolve this conflict or preclude the application of rule 4–1.7...." *Id.*

As for Gerson, the Supreme Court likewise found that "the impermissible conflict of interest should have been apparent to him" when he received notice that two of his clients (Raiti Waerness and Peggy Spurgeon) objected to the action against FAMRI, and that "his subsequent withdrawal" as counsel did not "resolve the conflict of interest or evade the applicability of rule 4–1.7." *Id.*[5] The *Young* court also concluded that Gerson and Hunter violated Rule 4-1.7 despite the fact that

[5] Gerson withdrew from his representation of Waerness but did not similarly seek to withdraw from Spurgeon's representation because her progeny case had been dismissed for lack of prosecution.

Gerson "may not have been direct counsel to Young or Blissard, and Hunter may not have been direct counsel to Young," because the attorneys representing flight attendants in *Broin* progeny cases had utilized a "team approach" involving the "sharing of information and confidences." *Id.,* citing *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987) (explaining that when groups of attorneys and clients work together and pool or share information "the attorney for one becomes the attorney for the other").

Finally, the Supreme Court found that both Respondents also violated Rule 4-1.9 because: (a) "the petition against FAMRI, the individual progeny suits, and the original class action are substantially related because they involve the same transaction or legal dispute"; and (b) "the interests of the individuals participating in the action against FAMRI are materially adverse to the interests of Hunter and Gerson's former clients who objected to the petition against FAMRI and did not give their informed consent." *Id.* at p. 583.

The Supreme Court then asked "The Florida Bar to investigate whether any Florida Rules of Professional Conduct were violated during the underlying proceedings or during the presentation of this case to this Court." *Id.* at p. 576. The court made no mention of the fact that a grievance committee had already investigated the matter and had found no probable cause for discipline – a fact the

court may not have been aware of or appreciated.[6] The Bar then commenced yet another investigation of "possible" violations of Rules 4-1.7, 4-1.9, 4-3.3, and 4-8(c). TE-52, 53. An "investigating member" of the assigned grievance committee then recommended that both Respondents "face discipline according to the Rules Regulating the Florida Bar." *Id.*

On May 24, 2015 both Respondents appeared before the second grievance committee. Three days later the committee advised each Respondent that it "found no probable cause for disciplinary proceedings." TE-58, 59. Approximately a month later Michael J. Higer, as the "designated reviewer," and pursuant to Rule 3-7.5(a)(1), directed both matters "back to the grievance committee for reconsideration." TE-60. On remand the "investigating member" again recommended that Respondents "face discipline" for violating Rules 4-1.7 and 4-1.9, and urged the committee to "discuss and determine" whether Respondents "violated Rules 4-3.3 and 4-8.4(c)." TE-62, 63.

On October 1, 2015 the grievance committee advised Respondents that it had again "found no probable cause for disciplinary proceedings." TE-67, 68. Mr. Higer, however, decided to refer both cases to the Board of Governor's "Disciplinary Review Committee" in accordance with Rule 3-7.5(a)(2). TE-69, 70. The

[6] The Referee has reviewed the parties' filings in the Supreme Court and it appears as though the first grievance committees' finding of no probable cause was mentioned only once in footnote 10 of Hunter's Answer Brief.

Disciplinary Review Committee deliberated in January 2016 and recommended a finding of probable cause "as to Rules 4-1.7 and 4-1.9" – a recommendation that "was confirmed by the full Board of Governors." TE-71. Pursuant to Rule 3-7.4(1) the Bar filed its formal complaints with the Florida Supreme Court. The undersigned was then appointed Referee ("Referee" or "Court") to preside over both cases.

A consolidated trial took place on December 27 and 28, 2016. The Bar was represented by Thomas Kroeger, Esquire. Respondent Hunter was represented by John Weiss, Esquire and Respondent Gerson was represented by David Pollack, Esquire. The Referee has reviewed extensive documentary evidence and heard from a number of witnesses both through affidavits and live testimony. The parties also have briefed all pertinent legal issues. The matter is now ripe for disposition.[7]

II. The *Broin* Litigation and Settlement

In 1991 a nationwide class action lawsuit was filed against "big Tobacco" on behalf of a putative class defined as non-smoking flight attendants afflicted with illnesses caused by exposure to second hand smoke while working in the cabin of commercial airliners. The case, styled *Norma Broin v. Phillip Morris,* 91-49738 CA (22), was filed by Stanley M. Rosenblatt, P.A. Mr. Rosenblatt and his wife Susan

[7] Counsel stipulated to the admission of all documentary evidence and otherwise cooperated in the preparation and presentation of this case. The Court appreciates their professionalism, thorough preparation and excellent briefing.

prosecuted the matter for approximately six (6) years before securing a class action settlement.

The "Settlement Agreement" dated October 9, 1997 provided no compensation to class members. TE-1. What the class members did receive was "the right to bring individual claims for compensatory damages against the Settling Defendants only... based upon any theory of liability other than for fraud, misrepresentation, conspiracy to commit fraud or misrepresentation, RICO, suppression, concealment, or any other alleged willful or intentional conduct." *Id.* at p. 9. The class members were entitled to seek only compensatory damages and had a limited window in which to file suit during which all statute of limitation defenses were waived. The agreement also provided that in any such progeny case where the plaintiff sought damages on account of certain specified diseases the burden of proving "general causation" (i.e., whether exposure to smoke *can* cause the disease) would be "borne by the settling Defendant." *Id.* at p. 10. Class members were, however, still required to prove that exposure to second hand smoke "caused" their particular illness (i.e., specific causation).

The Settlement Agreement also required the defendants to provide $300,000,000.00 to be used "solely to establish a Foundation whose purpose would be to sponsor scientific research with respect to the early detection and cure of diseases associated with cigarette smoking." *Id.* at p. 7. The Foundation was to be

"managed and directed by a Board of Trustees nominated by Class Counsel, and shall be governed in accordance with the terms of a trust instrument, subject to approval by the Court." *Id.* The agreement also required the defendants to pay Class Counsel $46,000,000.00 in attorney's fees plus $3,000,000.00 in costs – amounts that were negotiated only after "an agreement was reached among the parties as to all principal terms and conditions" of the settlement. *Id.* at p. 8.

Though the settlement drew significant opposition it received final approval from the trial court. TE-2.[8] That approval order was affirmed by the Third District which concluded that the settlement was "fair, adequate and reasonable," describing its benefits as "*abundant.*" *Ramos v. Philip Morris Companies, Inc.*, 743 So. 2d 24 (Fla. 3d DCA 1999) *Id.* at p. 31. The *Ramos* court highlighted, as benefits to the class, the fact that class members received a waiver of the statute of limitation – a defense which, in the court's view, presented "a *serious* problem for *most, and close to all* of the class members," as well as the agreement's "burden shifting provision" establishing a "general causation" presumption in favor of the flight attendants. *Id.* at pp. 31, 32. The *Ramos* court also rejected the objections to the "foundation fund,"

[8] The trial court's order approving this settlement retained jurisdiction over the settlement funds and Foundation, and the trial and appellate courts were told that FAMRI would "be under the continuing supervision and direction of the trial court." *See, e.g.,* Brief of Attorney Ad Litem, p. 5. As it turns out, in the now 18 years since there has been no judicial oversight exercised and no periodic reporting of FAMRI's activities has been provided to the court. Rather it appears that this Foundation has been operated by the Trustees with absolutely no judicial supervision despite the fact that: (a) the court, as a fiduciary to absent class members, was charged with overseeing this fund; and (b) the court has never relinquished its jurisdiction.

emphasizing that: (a) nothing in the record suggested that "the tobacco companies would agree to settle if the money is to be directly paid to the class members," *Id.* at p. 32; and (b) that the "medical foundation will provide treatment to mitigate diseases afflicting many class members, such as chronic bronchitis and chronic sinusitis, in addition to providing early detection and treatment for diseases such as lung cancer." *Id.* at p. 33.[9]

III. The *Broin* Progeny Cases

Before to the settlement received judicial approval Rosenblatt recruited a number of personal injury attorneys willing to bring progeny suits on behalf of individual class members. The trial court was advised that these lawyers were willing to work on a pure contingent fee basis. TE-2, p. 13. The attorneys recruited included Miles McGrane, Gary Paige, Gerson and Hunter. Others, including Alvarez, later joined the effort. These attorneys, as well as others, eventually filed approximately 3000 *Broin* progeny cases in Miami-Dade County within the window

[9] Notwithstanding this observation by the *Ramos* court the Settlement Agreement does not appear to contemplate – or permit - use of Foundation funds to treat class members. Nor does the approval order authorize such expenditures. The Settlement Agreement provides that the purpose of the Settlement Fund was to establish a Foundation "whose purpose will be to sponsor scientific research with respect to the early detection and cure of diseases associated with cigarette smoking" in general. TE-1, p. 7. The approval order, however, described the Foundation's mission as sponsoring "research for early detection and cure of diseases of flight attendants caused through cigarette smoke." TE-2, p. 14. While these descriptions of the Foundation's purpose differ, neither authorizes the Foundation to use funds to treat class members. And neither the Settlement Agreement nor approval order have been modified. *See, Philip Morris Inc. v. French*, 897 So. 2d 480, 482-483 (Fla. 3d DCA 2004) (explaining that the *Ramos* court affirmed the approval of the Settlement Agreement "without modification"). Yet the *Ramos* court was told that the Foundation contemplated supporting facilities "throughout the United States to provide class members with individualized clinical treatment plans and counseling, free of charge." Brief of Attorney Ad Litem, p. 5. Apparently this contemplated plan never came to fruition.

provided by the Settlement Agreement.[10] Over the ensuing decade only eleven (11) of those cases proceeded to trial. Ten (10) resulted in defense verdicts, and one class member had a judgment entered against her for attorney's fees and costs due to her rejection of a nominal settlement offer. The overwhelming majority of the cases lay fallow with many eventually being dismissed for lack of prosecution. Suffice it to say this "project" proved to be expensive, time consuming, extremely risky and wholly unsuccessful; one reason being that class members were unable to prove specific causation. Class members – and more so their counsel – were therefore reluctant to proceed further along the "progeny lawsuit" path.

IV. An Alternative "Strategy" and Pre-Filing Negotiations

With thousands of cases in inventory, considerable attorney time and costs invested, and no real prospects of recovery by way of individual suits, the team of lawyers representing progeny plaintiffs turned to "Plan B." Initially conceived by McGrane, the idea was to negotiate a direct payment to class members by FAMRI and petition the court for approval. At the time FAMRI was – and still is – managed by trustees designated by the Rosenblatts including themselves, John B. Ostrow, Esquire, (who had been appointed as Attorney Ad Litem for absent class members) and certain class members including Blissard and Young. TE-4. The plan was to

[10] Gerson field approximately 600 progeny cases. Hunter filed approximately 330.

persuade the Rosenblatts – who in counsel's view clearly controlled FAMRI – to authorize a distribution to those class members who had filed individual cases and secure the approval of the tobacco companies and eventually the court.

The proposed petition seeking court approval for a distribution would be filed by the Rosenblatts who had never been – and apparently still have not been – discharged as class counsel. According to the testimony of Gerson, Hunter and Alvarez, the Rosenblatts were initially receptive to the idea of using *limited* Foundation funds to compensate class members, recognizing that but for the tobacco industry's strident objection the $300,000,000.00 that funded the Foundation would have been paid to class members in the first place.[11] Alvarez also made it clear that counsel did not seek to terminate the Foundation or interfere with its charge. At a meeting in early February 2010 Alvarez provided the Rosenblatts with a copy of the proposed petition and followed up with an email confirming that:

> I just want to reiterate that we want to ensure that this proposal is done with the 3 goals I told you were paramount of: 1. FAMRI's continued existence and good work. 2. Closure for the Flight Attendant Litigation and 3. Eliminate any exposure to the parties and their counsel.

TE-7.

[11] At the fairness hearing before the trial court Rosenblatt in fact made clear that: "[w]e wanted the $300,000,000.00 to go the flight attendants. There was one problem. That was a deal killer. That was an absolute deal killer. They [Tobacco] would not do that. They have never done that, the tobacco industry, they will not do it." Transcript and proceedings in *Broin*, January 26, 1998.

Throughout 2010 the parties attended a number of meetings to negotiate the amount to be distributed and explore: (a) whether a distribution of Foundation assets could be made without IRS and Attorney General approval; and (b) whether such a distribution would jeopardize FAMRI's tax exempt status. Both sides (the Rosenblatts and progeny counsel) retained experts in trust and taxation matters to advise them and agreed to mediate the case with Andrew Hall, a respected commercial litigator. According to Gerson, Hunter and Alvarez, Mrs. Rosenblatt, at a pre-mediation meeting, had "thrown out" the sum of $18,000,000.00 as a possible distribution while progeny counsel were demanding close to $50,000,000.00, a number they were ready to negotiate.

The mediation with Mr. Hall took place April 28, 2010 and lasted less than one hour. When it commenced Mr. Hall delivered to Gerson letters directed to him and authored by his progeny clients, Spurgeon and Waerness. Those letters had, however, been sent to Elizabeth Kress, Executive Director of FAMRI. Spurgeon's letter advised Gerson that:

> I have recently learned that you, as my lawyer, are challenging the ability of FAMRI to continue to conduct the affairs of research being done on second hand smoke and its effect on flight attendants and others. I oppose any action against FAMRI as its good work is very important to me and other flight attendants.
>
> I do not wish for you, as my lawyer, to sue FAMRI under any circumstances when doing so adversely impacts me, your client, and other flight attendant clients.

TE-8. Similarly, Waerness advised Gerson that:

> It has come to my attention that you, as my attorney for my individual law suit resulting from the Flight Attendant Class action and others, are planning a court challenge questioning the ability of FAMRI to live up to its mandate and mission statement of protecting the interests of our class. As a former flight attendant and member of the suit that was filed against the tobacco industry, I have not authorized anyone to represent me in this action against FAMRI and I am strongly against any legal action that would undercut the good works that FAMRI is doing. As my lawyer you should not proceed against FAMRI under any circumstances.

TE-9.

According to Gerson it was obvious that these letters had been solicited and drafted by the Rosenblatts (or someone acting at their direction) as a strategy to assert a conflict of interest and derail the contemplated petition. After reviewing the Rules Regulating The Florida Bar, and consulting with his partner, Gerson concluded that the proposed action would not be "directly adverse" to the interests of any class members, including Spurgeon or Waerness. He also concluded a petition seeking to compel judicial oversight and a limited distribution to class members would not be deemed "substantially related" to the personal injury progeny cases for conflict purposes.

Other lawyers on the team also received correspondence from progeny clients objecting to any action against FAMRI. Hunter received a letter from Blissard objecting to him bringing "any claim against FAMRI," and Young voiced her protest

to McGrane who, in response, advised that he would be filing a motion to withdraw as "your attorney immediately." TE-11. A month later, however, McGrane had a change of heart and told his co-counsel that he could no longer be involved in any "lawsuit or claim against FAMRI or its board of directors" because: (a) a number of his clients opposed him doing so and "to proceed against their wishes could be conflict"; and (b) the Rosenblatts had "assisted in a lawsuit brought against tobacco companies on behalf of his wife's family." McGrane felt that to "take a position adverse to [the Rosenblatts] would be more than a conflict, it would be disloyal." *Id.*

Undeterred by these client objections Gerson and Hunter withdrew as counsel for those few progeny clients that had voiced displeasure and, along with Alvarez and others, continued in their effort to negotiate a settlement with the Rosenblatts which would provide their clients compensation from FAMRI. According to Alvarez the discussions were promising through most of 2010.

The record indeed reflects that during the summer of 2010 both sides had agreed to work on a "proposed IRS submission." TE-17 (email from Stanley Rosenblatt to Gary Paige). At that point progeny counsel pressed for an agreement on "the amount to be paid out from FAMRI." *Id.* While the Rosenblatts agreed to "cooperate fully for you [plaintiff's counsel] to obtain a ruling from the IRS as to your concept," they refused to "make any further commitments." *Id.* Rosenblatt's

position was that the parties should first "see if the concept is acceptable to the IRS," and he did not "see why a specific amount needs to be included." *Id.*

In response Paige – on behalf of the group – continued to insist on an agreement as to the amount FAMRI was willing to distribute to the flight attendants. In an email dated July 16, 2010 he advised Rosenblatt that:

> ... it could be a waste of time, if we go through all the motions to get a possible ruling from the IRS and then we cannot agree on the amount. And then the flight attendants wasted 1to 2 years to obtain a possible ruling, that is meaningless to them.

Id. Rosenblatt then questioned how it "could be a waste of time to find out if what you seek is legal under the tax code," and again reiterated FAMRI's willingness to "cooperate" with the IRS inquiry. *Id.*

On August 28, 2010 Paige met with Rosenblatt and his counsel, Bruce Rogow. In a report of the meeting sent to Alvarez, Paige advised that Rosenblatt and Rogow were planning to meet with FAMRI's board to seek approval for a commitment to pay a specified amount to flight attendants *if* IRS and Attorney General approvals were secured. *Id.* Progeny counsel would in turn agree that if they could not secure those approvals no "suit against FAMRI" would be pursued. *Id.* The amount to be paid by FAMRI was still subject to negotiation. But by November things had not progressed, prompting Alvarez to advise Rogow that "we need to either finalize the

settlement negotiations or we simply file suit." *Id.* Rogow in turn advised Alvarez that the parties had reached an impasse.

V. The Petition

On December 1, 2010 Alvarez, Gerson and Hunter filed the "Petition to Enforce and Administer Mandate." TE-18. In the first paragraph the Petition stated that it was "being brought on behalf of flight attendant class members." *Id.* It did not clarify whether it was being brought on behalf of *all* class members or only some – or all – of the class members who had filed progeny suits. The Petition sought to invoke the court's authority under Chapter 617 of the Florida Statutes as well as its inherent authority to "oversee the proper execution of the Three Hundred Million Dollar ($300,000,000.00) settlement fund and the creation and formation of the Flight Attendant Medical Research Institution." *Id.*

The Petition alleged that "FAMRI, through its Board of Directors has substantially deviated from the Court's approved purpose," had "misused the settlement's funds, and had not benefited the 'flight attendant' class members." *Id.* at ¶ 4. According to the Petition substantial settlement funds had "been expended for purposes not approved by the court and otherwise misused." *Id.* at ¶ 4. In particular, the Petition alleged that contrary to the terms of the Settlement Agreement and approval order, FAMRI was organized not only to sponsor research for the early detection and cure of diseases of flight attendants caused by cigarette smoke, but

also to "promote, support and engage in activities carried on for charitable purposes." *Id.* at ¶ 13, citing FAMRI's Articles of Incorporation. The Petition also alleged that contrary to representations made to both the trial and appellate courts, no research centers were ever created, "no medical treatment was ever provided to class members," and "substantial FAMRI funds were spent outside the United States for purposes unrelated to the class members."[12]

The Petition further alleged that subsequent to the settlement's approval "there ha[d] been no direction or supervision by the trial court. No report, disclosure, or approval of the trial court ha[d] been requested or obtained by the board members of FAMRI." *Id.* at ¶ 16. The Petition then claimed that FAMRI failed to advise the court that its stated purpose (i.e., to conduct research on the effects of second hand smoke on flight attendants) could not be pursued as of April 2000 because Congress had passed a ban on smoking on all commercial flights and, as a result, research on the "topic of flight attendant exposure" could not be performed without violating federal law or unethically "exposing flight attendants to second hand smoke." *Id.* at ¶ 30.

[12] The Petition detailed examples of how FAMRI funds have been used for purposes having nothing to do with the early detection and cure of diseases inflicted upon flight attendants from exposure to cigarette smoke, including payments to assist physicians in rebuilding medical practices damaged by natural disasters, donations to the Haitian relief efforts, research on topics wholly unrelated to the effects of exposure to second hand smoke, donations to colleges and foundations, and other general research on issues having nothing to do with the diseases suffered by the *Broin* class members. TE-18, ¶¶ 23-25.

As for the relief requested, the Petition noted that the settlement funds "will certainly outlive the last surviving class member," and that the "the foundation could not provide any benefit to the class member once the class no longer exists." *Id.* at ¶ 32. It alleged that "[p]roviding monetary compensation to the class members now, in the twilight of their lives, is fair and reasonable and would provide a substantial benefit to the class members." *Id.* The Petition then asked the court to "order distribution of the settlement funds to class members." *Id.* at ¶ 34. The Petition also requested an accounting of "all funds received and expended," and an injunction prohibiting "further expenditures of sums not expressly approved" by the court. *Id.* at ¶ 35.

Throughout the negotiations preceding the filing of the Petition, progeny counsel had made clear that their goal was to secure a distribution of an amount far less than FAMRI's existing corpus. But the Petition contained no such limitation and could fairly be read as seeking to terminate FAMRI and distribute all of its remaining funds to class members. The Petition asserted that: (a) that the purpose of the Foundation had been legislatively frustrated and could no longer be served; (b) that the funds had not – and were not – being used to the benefit of class members; (c) that the Foundation "could not provide any benefit to" injured flight attendants; and (d) that the court should order "distribution of the settlement funds to class members." *Id.* Thus, notwithstanding counsel's "true intent" or ultimate goal, the

Petition plainly challenged the continued viability of FAMRI. It did not simply request judicial oversight and a *limited* distribution. Instead, as either an intentional attempt to secure settlement leverage, or inadvertent drafting, it challenged FAMRI's *raison d'être* and set in motion litigation that could have resulted in FAMRI's demise.

VI. The Motion to Disqualify

On May 23, 2011, almost six (6) months after the Petition was filed, and thirteen (13) months after first voicing objection to counsel's participation in litigation adverse to FAMRI, Blissard and Young filed their "Motion to Disqualify." TE-19. The motion alleged that counsel had "been instructed by movants and several other of their former class member clients that an action attacking FAMRI is an attack against their personal interests." *Id.* at p. 2. The motion further alleged that in "a fundamentally flawed attempt to cure the conflict of interest" between clients who wanted to proceed against FAMRI and "those who did not," counsel "simply abandoned the clients who expressed opposition to their current actions." *Id.*

Supporting the motion were affidavits of Blissard, Young, Waerness, former class member Rossie Chambers, and McGrane. Blissard testified that she had been represented by Hunter in her progeny suit for over ten (10) years, and that she had also worked closely with all of the initial attorneys including McGrane and Gerson.

According to Blissard these "attorneys acted as a team and I and other class representatives, Patty Young and Bland Lane, shared many confidences with them," including confidences regarding "myself, FAMRI." TE-19. (Blissard Affidavit, p. 2). Blissard testified that she spoke regularly to her counsel – Hunter – about herself, "FAMRI and other topics, as we were in a close attorney/client relationship." She also worked with Gerson, McGrane and other members of "my legal team." *Id.*

Young similarly testified that while directly represented by McGrane, she regularly met with the other lawyers, including Gerson and Hunter, as part of a "team effort," and she considered "all the attorneys my attorneys and was close to them." TE-19. (Young Affidavit, p. 3). She also testified that she "shared my confidences and very confidential information regarding myself, the litigation and FAMRI with my attorneys working with Miles, particularly Steven Hunter and Phillip Gerson." *Id.* She considered Gerson and Hunter her "trusted counsel and allies in the fight against tobacco pollution on all fronts, including FAMRI." *Id.* Young testified that she was "always very open with Gerson and Hunter about FAMRI," and that she was "sad that these lawyers... want to destroy FAMRI to distribute FAMRI's remaining funds to themselves and their 'class member' clients." *Id.* She felt "utterly betrayed" and was "speechless that Alvarez, Gerson and Hunter want to destroy FAMRI" – a "violation of the loyalty owed to us and their other clients." *Id.*

Chambers, another direct progeny client of Hunter, testified that in 2010 she learned from "a flight attendant colleague" that "Hunter, Phillip Gerson and Alex Alvarez and 4 others... filed a Petition to sue FAMRI for its assets..." TE-19, (Chambers Affidavit, p. 2). In response to a January 31, 2011 letter from Hunter seeking authorization to "sue the research institute" on her "behalf" she asked him "not to take this action." *Id.* She did not want "Mr. Hunter and his group of attorneys to touch a penny of our research money in FAMRI," as this was "ongoing research sponsored by FAMRI to help me and other flight attendants detect our diseases earlier and help us to find cures." *Id.* at pp. 2, 3.

Waerness also heard from "a fellow flight attendant" that her counsel, Gerson, planned to "raid FAMRI for its assets" and objected "to his taking such action against FAMRI." TE-19, (Waerness Affidavit, p. 2.) She objected to the Petition because in her view FAMRI's "work is important to flight attendants' health since it seeks to find early detection of diseases, treatment and cures for ailments we incurred." *Id.* In her view the "action against FAMRI by my attorney, Phillip Gerson, and his cohorts, Steven Hunter and Alex Alvarez is reprehensible as they attempt to line their own pockets on the guise of providing compensation to their clients." *Id.*

The Motion to Disqualify was also supported by the "Affidavit of Miles McGrane, III" who first professed to have had "a very close professional and

personal relationship with" Hunter, Gerson and Alvarez. TE-24, pp. 1-2. McGrane testified that he had worked closely with these attorneys over the "11 years we have been representing flight attendants," and that despite this "relationship" with Hunter, Gerson and Alvarez he recognized that "a grave injustice is being done here by attorneys with conflicts to the detriment of my clients and our shared clients, and also to FAMRI and its Board members, as well as tarnishing the reputation of the legal profession in South Florida." *Id.* at p. 2.

According to McGrane the attorneys filing the Petition had "unresolved conflicts" because many of their clients were "very satisfied" with the 1997 settlement and "object to any claim against FAMRI," and because the "proceeding also place them in litigation directly adverse to their flight attendant clients who are board members of FAMRI." *Id.* at p. 2. McGrane also testified that FAMRI board members Young, Blissard and Lane "shared many confidences with" Gerson and Hunter "about themselves, their claim and FAMRI," and that the attorneys handling *Broin* progeny cases decided early on that they "would work on the cases jointly, sharing information, discovery, and trial strategy and we would participate and assist in each other's trials." *Id.* at pp. 3-4. Meetings would be held weekly and counsel "freely exchanged information about each case...." *Id.* at p. 5. In his view the "handling of flight attendant litigation was and continued to be a 'team effort' until the filing" of the Petition against FAMRI. *Id.*

Along the same lines McGrane testified that Young, Blissard and Lane "were very helpful to our legal team and met with our group of attorneys whenever we requested, sometimes for days at a time," and that they "spoke freely to us about themselves, their claims, their experiences working for airlines when smoking was permitted and also freely provided information and confided in us about FAMRI and their work with FAMRI." *Id.* In his view the attorneys "who shared confidential information" had a "basic conflict" attacking the "Board of FAMRI" – a conflict that "withdrawing as counsel cannot cure." *Id.*

Buttressed by this testimony the movants insisted that Gerson, Hunter and Alvarez had "breached their duties of confidentiality and loyalty to their current and former clients," and that their participation in the case against FAMRI ran afoul of Rule 4-1.7 and 4-1.9. TE-19, p. 14. In the movants' view, the Petition sought relief that was materially adverse to the interests of Young and Blissard because it contained allegations directly against them as FAMRI "Trustees." The filing also was materially adverse to the interest of former class members such as Chambers and Waerness who were "satisfied with and have benefited from the Settlement Agreement." *Id.* at p. 16.

Both Gerson and Hunter, as well as Alvarez, filed affidavits in opposition. Through his affidavit Gerson testified that:

a. He had not received any non-public information about FAMRI or its board members;

b. "more than 250" of his progeny clients had authorized – and supported – the Petition;

c. that he had never represented or reviewed the files of Young, Blissard or Lane;

d. that Blissard had "never disclosed any information" to him about "the operation of the Board of Directors of FAMRI";

e. that his contact with Blissard was "limited to her involvement as a fact witness in a few *Broin* progeny trials and seeing her at some social events";

f. that he had never represented Young, and that Young had "never disclosed any information" to him regarding FAMRI;

g. that he did not meet regularly with Young and "barely" knew her;

h. that he had never met or had any dealing with Chambers;

i. that while he represented Waerness in her progeny case – and at Rosenblatt's request filed her claim "two days before the statute of limitation ran" – he was never provided "any information concerning her" and withdrew from her representation after receiving her letter during the April 2010 mediation;

j. that at Rosenblatt's request he also filed Spurgeon's progeny case two days before the expiration of the statute of limitation but he had never met or spoken to her.

TE-28.

Hunter's affidavit was more succinct. He testified that he had been retained by Blissard; that after she objected to "any action to enforce the Mandate of the Third District Court of Appeal" in *Ramos* he withdrew as her counsel; that he did not represent her "with respect to her role as a member of the Board of Directors of FAMRI" and had not "acquired any confidential information material to Blissard's dealings with FAMRI"; that he had never represented – or received any confidential information from – Young; and that when Chambers objected to the Petition he "immediately filed a motion to withdraw." TE-30.

Alvarez also submitted an affidavit contradicting all material allegations made by Young, Blissard and McGrane, testifying that he had never reviewed any portion of Young and Blissard's files. TE-31, p. 2. He then testified that McGrane supported – and authored the first draft of the Petition – as its "chief strategist" – and that McGrane had announced his intention to withdraw as Young's counsel after she voiced an objection, then "unexpectedly… withdraw from this project" due to his "personal loyalty" to the Rosenblatts. According to Alvarez, McGrane had never "questioned the merits or legal basis of the Petition." *Id.* at p. 7. Prior to filing his

affidavit in support of disqualification, and never "voiced any reservation about my firm proceeding with the Petition that his office initially authored." *Id.* at p. 10.

Argument on the Motion to Disqualify was held on June 30, 2011. FAMRI was represented by John Kozyak, Esquire and Jessica Elliott, Esquire of Kozyak Tropin Throckmorton, as well as Christian Searcy and David Sales of Searcy Denney. Movants Blissard and Young were represented by Roderick Petrey and Miles McGrane. The Respondent attorneys were represented by former Circuit Judge Israel Reyes. TE-32, p. 4. Though afforded the opportunity, no party offered live testimony. The matter was therefore adjudicated in a paper mini-trial consisting of conflicting affidavits. There were, however, two relevant points clarified during oral argument.

First, and in response to Mr. Kozyak's observation that the Petition was designed to "go after FAMRI, its directors and its board members," thereby seeking relief directly against Blissard and Young, Mr. Reyes tried to moot this glaring problem by advising the court that:

> Let me just correct something. At this point, my clients have authorized me to advise this court that they will not be going after Ms. Blissard and Ms. Young to use that language. They're waiving any claim they have against them individually. So that's not an issue in the case anymore.

TE-32, p. 19. Mr. Reyes did not elaborate as to when this decision to "waive" such claims had been made, or whether it had been approved by any of the progeny claimants who had authorized the Petition.

Next, in an attempt to clarify which class members would benefit from part of the relief sought (i.e., a distribution of FAMRI's funds) Mr. Reyes first advised the court that although his clients had an authority to proceed executed by "400 flight attendants if they prevail, every class member prevails." TE-32, p. 48. Then, after conferring with his clients, he abruptly altered his position advising the court that "the petition is being brought on behalf of individual petitioners who are part of the class action. They're not bringing this Petition forward on behalf of the entire class action." TE-32, p. 57. It was thus represented, at least as of June 2011, that the monetary relief sought would benefit *only* those class members who had expressly authorized the filing.

The trial court took the matter under advisement and, as discussed earlier, entered its disqualification order. That order was quashed by the Third District and later reinstated by The Florida Supreme Court.

VII. Analysis

Before addressing the substantive issues two preliminary matters warrant discussion. The first is whether the Court is "bound" by the conclusions reached by the Supreme Court in *Young*. The second is whether Rule 4-1.9 has any application

at all here given the *Young* court's adoption of the so called "hot potato" doctrine, which provides that lawyers faced with a conflict between two existing clients may not avoid "current" client conflict rules by converting a "current client into a former client by withdrawing from the client's case." *Young, supra* at 581, citing *ValuePart, Inc. v. Clements*, 06 C 2709, 2006 WL 2252541 (N.D. Ill. Aug. 2, 2006) (explaining 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").

A. Are the Conclusions Reached by the *Young* Court Binding in this Disciplinary Proceeding?

As the Court noted earlier, it is not uncommon for bar grievance proceedings to arise out of prior civil litigation. *See, e.g., The Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011) (disciplinary proceeding brought after appellate court had concluded that "[i]t defies any bounds of ethical decency to view class counsel's actions as anything but a flagrant breach of fiduciary duty"); *The Florida Bar v. Cosnow*, 797 So. 2d 1255 (Fla. 2001) (disciplinary proceeding followed judicial finding that attorney had created a conflict of interest and had violated Rule 4-1.7); *The Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010) (disciplinary proceeding based upon facts resulting in formal disqualification due to a conflict of interest in violation

of Rule 4-1.9). The question then becomes to what extent, if any, is a referee bound by findings made in prior litigation or legal conclusions flowing from those findings.

Our Supreme Court has made clear that: (a) a referee in a disciplinary proceeding may consider judgments entered by other tribunals, and "may properly rely on such judgments to support his or her findings of fact"; and (b) an attorney is not necessarily entitled to "relitigate" findings and conclusions reached in "civil litigation" preceding their disciplinary case. *The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1159 (Fla. 2015); *The Florida Bar v. Gwynn*, 94 So. 3d 425 (Fla. 2012) ("[t]he Court has clearly held that a referee in a bar disciplinary proceeding can properly rely upon facts established in orders and decisions of other tribunals..."); *The Florida Bar v. Shankman*, 41 So. 3d 166 (Fla. 2010) ("[t]he case law unequivocally supports the referee's taking judicial notice of the federal report and recommendation and order in this bar disciplinary case"). But precedent – as well as the bar rules – make it equally clear that such findings – and legal conclusions based thereon – are not preclusive. *See, e.g., The Florida Bar v. Garland*, 651 So. 2d 1182 (Fla. 1995) (citing Rule 3-4.4 which provides that "the findings, judgment or decree of any court in civil proceedings" are not "necessarily... binding in disciplinary proceedings"). There are sound reasons why this is so.

First, the burden of proof in civil litigation and disciplinary proceedings is materially different. In civil cases the party bearing the burden of proof must prove

its case by a mere "preponderance of the evidence." In a disciplinary proceeding, however, the Bar must prove its case by "clear and convincing" evidence, defined as an "intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994). For this reason findings made in a civil case based upon a preponderance of the evidence are not preclusive in a later proceeding mandating a greater burden of proof. *See, e.g., Douglas v. State*, 43 So. 3d 196, 198 (Fla. 4th DCA 2010) ("[t]he law is well-settled that, because different standards of proof apply, a violation of probation can be based on criminal conduct for which a defendant is subsequently acquitted by a jury").

Secondly, potential consequences motivate, and the interests at stake in a civil case are, in most instances, far less serious than those implicated in a subsequent disciplinary proceeding. A lawyer faced with the possibility of disqualification may defend the claim less aggressively given that the consequence of an adverse ruling is an inability to participate in a single case. A disciplinary action, however, is a whole different ball game. A lawyer's reputation and livelihood are often in jeopardy. For this reason an attorney may desire to – and should in appropriate cases be afforded the opportunity to – "relitigate" disputed factual issues. *See, e.g., The*

Florida Bar v. Carricarte, 733 So. 2d 975, 978-979 (Fla. 1999) (due process requires that an attorney facing discipline be permitted to "explain the circumstances of the alleged offense and offer testimony in mitigation of any penalty to be imposed"). That does not, however, mean that a referee should disregard factual findings or legal conclusions made by courts in prior civil cases. Rather, absent materially different evidence or other compelling circumstances a referee should afford those findings and conclusions significant deference. Thus, absent such materially different evidence, either in quality or quantity, this Referee will give deference to the *Young* court's findings and conclusions. But those findings and resulting conclusions – with the *exception* of pure legal holdings – are not binding in this disciplinary proceeding.

B. <u>Does Rule 4-1.9 Have Any Application to this Case</u>?

Though related, Rule 4-1.7 and Rule 4-1.9 are materially different. The former governs conflicts of interest with "current" clients, whereas the latter addresses potential conflicts with "former" clients. The former is more exacting than the latter. It prohibits any representation of a client that will be "directly adverse" to "another client" – period. *See* Rule 4-1.7 (a). For purposes of this "current" client conflict rule a lawyer may not act as an advocate in a manner "directly adverse" to a person the lawyer represents even if the matter is "wholly unrelated." *Holmes v. Adrian Art Deco Rivera Hotels & Rest., Inc.*, 2000 WL

682760 (S.D. Fla. 2000). Nor does it matter whether the conflict is "material." *Lincoln Associates & Const., Inc. v. Wentworth Const. Co., Inc.*, 26 So. 3d 638 (Fla. 1st DCA 2010). The Rule is straightforward:

> ... based on the ethical-concept requirement that a lawyer should act with undivided loyalty for his client and not place himself or herself in a position where a conflicting interest may affect the obligations of an ongoing professional relationship. It is difficult to imagine how a lawyer could appear in court one day arguing vigorously for a client, and then face the same client the next day and vigorously oppose him in another matter, without seriously damaging their professional relationship. Such unseemly conduct, if permitted, would further erode the public's regard for the legal profession.

Morse v. Clark, 890 So. 2d 496 (Fla. 5th DCA 2004).

Rule 4-1.9 is not as unyielding. Generally speaking, it only prohibits a lawyer who has represented a former client from representing another client "in the same or substantially related matter" in which the former client's interests are "materially adverse." Rule 4-1.9(a). And the question of whether two matters are "substantially related" is often fairly debatable. *See, e.g., Phillip Morris, USA, Inc., v. Caro*, 41 Fla. L. Weekly D2722 (Fla. 4th DCA, December 7, 2016); *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630 (Fla. 1991); *Health Care & Ret. Corp. of Am., Inc. v. Bradley*, 961 So. 2d 1071 (Fla. 4th DCA 2007).

Given the difference between these two conflict of interest rules the question of whether a case involves a "current" or "former" client can be critical and, in some circumstances, even outcome determinative. For this reason attorneys faced with a

conflict involving two or more "current" clients would sometimes: (a) withdraw from one client's continued representation; (b) assert that the complainant was then a "former-client"; and (c) claim that the disqualification question was therefore governed by the "former" client conflict rule. They would then, as Hunter does here, cite the comment to Rule 4-1.7 in support of this protocol.

> If a conflict arises after representation has been undertaken the lawyer should withdraw from the representation. *See* Rule 4-1.6. When more than one client is involved and the lawyer withdraws because a conflict arises after representation whether the lawyer may continue to represent any of the clients is defined by Rule 4-1.9.

See Hunter's Reply to the Bar's Motion for Summary Judgment, p. 7.

In *Unified Sewerage Agency of Washington County, Or. v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981) the Ninth Circuit rejected this procedure and held that an attorney faced with a conflict involving two present clients may not "convert a present client into a 'former client' by choosing when to cease to represent the disfavored client." *Id.* at fn. 4. The court concluded that in such a circumstance the current client "standard" controls notwithstanding that the representation ceased "prior to filing of the motion to disqualify." *Id.* Other courts have similarly held that when "a lawyer or law firm suddenly finds itself in a situation of simultaneously representing clients who either are presently adverse or are on the verge of becoming adverse, it may not simply 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." *ValuePart, Inc. v. Clements*, 06 C 2709, 2006 WL 2252541 (N.D. Ill. Aug. 2, 2006), citing *Alex Munoz General Contractor, Inc. v. MC3D, Inc.*, 1998 WL 831806, *3 (N.D. Ill. Nov.25, 1998)

In *Young* our Supreme Court adopted the rationale of these authorities and made clear that Gerson and Hunter could not – by withdrawal – "convert" their current progeny clients (i.e., Blissard, Chambers, Waerness and Spurgeon) into former clients and thereby "evade the applicability of rule 4–1.7." *Young*, 136 So.2d at 582. This purely legal holding is binding here. And in this Referee's opinion the same person cannot be both a "current" and "former" client for purposes of analyzing whether one act by counsel (filing and prosecuting the Petition against FAMRI) violated the Rules Regulating The Florida Bar. The individuals who objected here 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 and Hunter's withdrawal. *Young, supra.*

For this reason the *only* question presented here is whether counsel violated the more restrictive "current" client rule. And because the complaining clients were never "converted" into "former" clients, it matters not whether the Petition against FAMRI was "substantially related" to the *Broin* progeny personal injury suits. The relevant inquiry is whether – by filing the Petition – Gerson and Hunter acted in a

manner "directly adverse" to their progeny clients. If they did, a violation of 4-1.7 occurred – plain and simple.

VIII. The Rule 4-1.7 Violation

In assessing whether – and to what extent – Respondents violated Rule 4-1.7, the Court will first address the claimed conflict with the interests of the progeny clients who were also FAMRI board members (i.e., Blissard and Young). The Court will then turn to the claim involving Spurgeon, Waerness and Chambers; progeny clients who had absolutely no involvement with FAMRI.

A. Blissard and Young

There is no question, as our Supreme Court has already found, that the Petition advanced claims "directly adverse" to Blissard and Young – two members of FAMRI's Board of Trustees. The Petition alleged – in no uncertain terms – that FAMRI – under the direction of its board – was not adhering to its court appointed mandate; that its funds were not being used in a manner authorized by the Settlement Agreement; and that its funds – or a portion thereof – should be distributed directly to a certain sub-class of the flight attendant class members. The claims asserted – and the relief sought – clearly were "directly adverse" to the interests of FAMRI and the members of its board, including Blissard and Young.

Since Hunter represented Blissard in her progeny case, and failed to secure her consent, it thus follows that he violated rule 4-1.7 by filing the Petition. As the

comment to the rule "clearly explains," *see Young* at 581, "[l]oyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent." Comment to R. Regulating Fla. Bar 4–1.7. By filing the Petition against FAMRI without Blissard's consent Hunter violated the Rule 4-1.7 which, under the circumstances, imposed upon him a duty to "decline to pursue the Petition against FAMRI" – a duty he could not discharge by withdrawing as her counsel. *Young, supra.*[13]

As for Young, however, the issue is much murkier. It is undisputed that Young never retained either Gerson or Hunter and, as a result, was never a "direct" client of either. She retained and was represented in her progeny case by McGrane. Given this uncontradicted fact there are only two circumstances under which Gerson and Hunter would owe her a duty of loyalty. Such a duty would arise: (a) if Young had a reasonable subjective belief that she had consulted with Respondents and had manifested an intent to seek professional legal advice, *Mansur v. Podhurst Orseck, P.A.*, 994 So. 2d 435 (Fla. 3d DCA 2008); *The Florida Bar v. Beach*, 675 So. 2d 106 (Fla. 1996); or (b) if, as the *Young* court noted, Gerson and Hunter participated in "a team approach" to the representation of the flight attendants in the progeny cases involving "the sharing of information and confidences..." *Young, supra* at 582.

[13] The Bar appears to have abandoned any claim that Gerson owed any duty of loyalty to Blissard, and her affidavit does not suggest that she ever shared any confidences with him.

In her affidavit Young never claims to have consulted with either Gerson or Hunter. She says that Respondents worked closely with her counsel; that she regularly met and shared confidences with these lawyers, "particularly Gerson," and that during these sessions the participants would discuss topics such as "how the cases should be tried, witnesses to call at trial and exhibits to use." But she never claims to have consulted with – or to have sought legal advice from – either Gerson or Hunter, and both Respondents have testified – unequivocally – that no such consultation ever occurred. For this reason Respondents did not assume a duty of loyalty towards Young. *See, e.g., Jackson v. BellSouth Telecommunications*, 372 F.3d 1250 (11th Cir. 2004) ("regardless of a putative client's subjective beliefs, there can be no attorney-client relationship when the client does not consult with the attorney"); *In re Lentek Intern., Inc.*, 377 B.R. 396 (Bankr. M.D. Fla. 2007) ("an actual consultation is a prerequisite to forming a reasonable belief supporting an attorney-client relationship").

Indeed The Bar does not advocate that *Young* had a subjective and reasonable belief that Respondents were her "counsel," thus triggering a duty of loyalty. It asserts that progeny counsel employed a "team approach" to the representation in progeny cases involving the "sharing of information and confidences." *Young,* supra 135 So. 2d at 582. To support this claim the Bar relies upon the affidavits of Blissard, Young and McGrane – witnesses it did not call live and subject to cross-

examination. Instead the Bar chose to try its case by "affidavits" even though credibility was clearly at issue. *R-T Leasing Corp. v. Ethyl Corp.*, 494 F. Supp. 1128 (S.D.N.Y. 1980) (in circumstances where credibility is at issue "affidavits are no substitute for strident cross-examination").[14] In contrast, Gerson, Hunter and Alvarez appeared live and unequivocally testified that Young never disclosed to them any information – let alone confidential information – about FAMRI.

As noted earlier, this Court is entitled to consider – and may even rely upon – "facts established in orders and decisions of other tribunals to support" its findings of fact. *The Florida Bar v. Gwynn*, 94 So. 3d 425 (Fla. 2012). A referee also is entitled to consider "any relevant evidence," including hearsay and judgments and orders entered by courts in related civil proceedings. *Id. The Florida Bar v. Head*, 27 So. 3d 1 (Fla. 2010) ("... a referee has wide latitude to admit or exclude evidence, and may consider any relevant evidence, including hearsay and the trial transcript or judgment in a civil proceeding"). But when testimony is conflicting a referee "is charged with the responsibility of assessing the credibility of witnesses based on their demeanor and other factors," *The Florida Bar v. Hayden*, 583 So. 2d 1016 (Fla. 1991), and as "fact finder [a referee] properly resolves conflicts in the evidence." *The Florida Bar v. Hoffer*, 383 So. 2d 639, 642 (Fla. 1980). As also touched upon

[14] As Justice Pariente remarked during oral argument in *Young*, the affidavits before the trial court were in conflict and no actual findings of fact were made in the civil disqualification proceedings.

earlier, "[i]n Bar discipline proceedings, evidence of misconduct must be clear and convincing for a finding of guilt." *The Florida Bar v. Pellegrini*, 714 So. 2d 448 (Fla. 1998) *Slomowitz v. Walker*, 429 So. 2d 797 (Fla. 4th DCA 1983) (to satisfy the "clear and convincing" standard "evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established").

After careful consideration of the evidence, both qualitatively and quantitatively, the Court finds that the Bar has not proven, by clear and convincing evidence, that Young – as part of a "team approach" to the prosecution of *Broin* progeny cases – shared information or confidences with Gerson or Hunter and, as a result, imposed upon them a duty of loyalty. *See Visual Scene, Inc. v. Pilkington Bros., plc.*, *supra.* While Young – by affidavit *only* – testified in broad strokes that such confidences and information were shared, not a single detail was provided, such as the date of any meeting, the identity of those participating, or the substance of any discussion. Nor was a single document tending to prove that such "confidences" were shared admitted into evidence; such as a written joint prosecution agreement, notes from any "team approach" session, or documents reflecting the substance of any information or confidences shared with Gerson or Hunter. Nor did any of the witnesses supporting this claim appear and subject themselves to cross-examination. Gerson and Hunter did, however, appear – subject themselves to cross-examination

– and testify clearly, convincingly and credibly that: (a) Young never consulted with either of them; (b) Young never sought legal advice from either of them; (c) Young never shared any confidential information with them; and (c) Young never claimed to be confiding in – or relying on – either of them prior to filing her affidavit in support of disqualification. Their testimony was supported by Alvarez, who also appeared live and whose testimony the Referee finds credible.

The Referee acknowledges that when a lawyer is retained directly there is an "irrefutable presumption that confidences were disclosed during the relationship." *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991). Here, however, there was no direct attorney/client relationship between Young and either Respondent. And the fact that the lawyers representing FAMRI clients employed a "team approach" does not – in this Referee's view – give rise to an "irrefutable presumption" that *all* clients disclosed confidences to *all* lawyers on the team. Further, as Justice Pariente observed during oral argument in *Young*, the fact that "confidences" regarding the strategy employed in the prosecution of the progeny personal injury cases may have been shared does not, *ipso facto*, mean that "confidences" regarding FAMRI and its operations also were shared.

Based upon the foregoing the Referee finds that:

1. Hunter violated Rule 4-1.7 by filing a Petition "directly adverse" to Blissard's interests as a Trustee of FAMRI; and

2. The Bar failed to prove – by clear and convincing evidence – that as part of a "team approach" Young shared information and confidences with Respondents regarding any aspect of FAMRI or its operation. As a result, the filing of the Petition, while "directly adverse" to her as a FAMRI trustee, did not constitute a violation of Rule 4-1.7 because Gerson and Hunter owed her no duty of loyalty.

B. Spurgeon, Waerness and Chambers

Turning to progeny clients Waerness, Spurgeon and Chambers, the issue of "direct adversity" presents with far more play in the joints. Unlike Young and Blissard, these progeny clients had no involvement with FAMRI and, as a result, no allegations in the Petition were levied against them, either directly or indirectly. Nor could any outcome of that litigation directly impact them financially or legally. So the question becomes how was the filing of the Petition "directly adverse" to their interests?

Gerson – not surprisingly – insists that it was not.[15] In his view the filing – while contrary to these clients' "wishes" – was not directly adverse to any legal interest protected by Rule 4-1.7. This is so, according to Gerson, because "[a]s used in the rule 'interests' means only 'the legal rights and duties of two clients *vis-a-vis*

[15] Respondent Hunter does not devote time to this issue, presumably because he directly represented Blissard who clearly had a financial and legal interest in the claims raised via the Petition.

one another.'" *See* Trial Brief on Direct Adversary, p. 2, citing American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Op. 05-434, at 1201:155 (Dec. 8, 2004); *In re Ellis V.N.,* W10CP07014999A, 2008 WL 725195, *.2 (Conn. Super. Ct. Feb. 26, 2008) ("finding no concurrent conflict of interest absent showing that 'parents' respective legal interests in the termination proceeding *will be directly adverse* to each other").

As support for his contention that the filing of the Petition was not "directly adverse" to any legally protected interests of those progeny clients *not* affiliated with FAMRI, Gerson refers the Court to *Simpson Performance Products, Inc. v. Robert W. Horn, P.C.*, 92 P.3d 283 (Wyo. 2004), and Judge Jordan's order in *Holmes v. Adrian Art Deco Rivera Hotels & Rest., Inc.*, 2000 WL 682760 (S.D. Fla. 2000). (Jordan, J).

In *Simpson Performance Products, Inc.* the client - SPP – hired attorney Horn to counsel it regarding a potential claim against NASCAR for asserting that the failure of a seatbelt it manufactured had caused Dale Earnhardt's death. SPP eventually decided not to bring suit. Upset by this decision the company's founding shareholder – Bill Simpson – hired Horn to bring the claim on his behalf. SPP then insisted that Horn's representation of Simpson violated Wyoming's conflict rule. The Wyoming Supreme Court disagreed, observing that "SPP fails to point to any disclosure of confidential information or breach of Horn's duty of loyalty, and the

irrefutable presumption of disclosure does not arise in this case, as SPP has failed to demonstrate that its interests are materially adverse to Horn's representation of Simpson." 92 P. 3d at 288. The court also refused to "to speculate as to the possible effects, adverse or otherwise, that Horn's representation of Simpson may have had, or could have, on SPP." *Id.*

In *Holmes* Judge Jordan rejected a former client's motion to disqualify her former lawyer from cross-examining her in a case in which they had their lawyer-client relationship, concluding that:

> In this case, Ms. Mercaldi's [the former client's] interest is simply not directly adverse to Mr. Holmes' and there is no conflict of interest. A victory for Mr. Holmes will have absolutely no adverse impact on Ms. Mercaldi. The fact that Ms. Mercaldi is no longer aligned with Mr. Holmes as his co-plaintiff by itself certainly does not indicate any adverse interest. That she is now a witness for the defense might, at most, show that her position is "generally adverse" to Mr. Holmes', but that does not create a conflict for [her former attorney] Mr. Spolter.

Id. at 5.

The complaining clients in *SPP* and *Holmes* were totally disinterested, as the claim (or defense) pursued by their counsel would not – and could not – impact them in any way. The same cannot be said of the flight attendant class members here. These clients – like all *Broin* class members – 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; a settlement which both the trial and appellate court

found to be in *their* best interest. And they – as well as all other class members – relinquished valuable legal rights in consideration for the funding of the Foundation because they believed (and the courts agreed) that its work would benefit them – at least indirectly, and hopefully directly.

For this reason progeny clients Waerness, Spurgeon and Chambers – like *all* class members – had a direct legal interest in FAMRI and the work they believed it was doing for their benefit and the benefit of others similarly situated, regardless of whether their "belief" was – in counsel's view – reasonable or accurate. These clients therefore had the right to insist that their counsel not participate in a case seeking relief that could be "directly adverse" to their interests regardless of whether they could "prove" that a likely outcome could cause them direct and quantifiable financial or legal harm. The Petition – pursued to one logical and possible conclusion – *could* have dismantled (or at least severely disrupted) a Foundation they bargained for, provided consideration for, and firmly believed had – and would continue to – benefit those exposed to second hand smoke. Thus, this Court concurs with the *Young* court's conclusion that the filing and prosecution of the Petition – over the objection of these clients – was "directly adverse" to their interests. *See, e.g., The Florida Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009) ("...nothing in the language of the rule ... restricts its application to directly adverse interests in the context of litigation between the two clients involved...").

Based upon the foregoing, the Referee finds that:

(a) Respondent Hunter violated Rule 4-1.7 by filing and prosecuting a Petition asserting claims "directly adverse" to the interests of his client Chambers; and

(b) Respondent Gerson violated Rule 4-1.7 by filing and prosecuting a Petition asserting claims "directly adverse" to the interests of his clients Waerness and Spurgeon.

IX. Recommended Discipline

Having recommended that both Respondents be found guilty of violating Rule 4-1.7 the Referee will next determine what, if any, disciplinary sanctions should be recommended to our Supreme Court. In doing so "three precepts should be applied." *The Florida Bar v. Adorno*, 60 So. 3d 1016, 1031 (Fla. 2011) "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and, at the same time, not depriving the public of the services of a qualified attorney due to undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent—sufficient to sanction a breach of ethics and, at the same time, encourage rehabilitation. Third, the judgment must be severe enough to deter others who might be prone to become involved in like violations." *Id.* (Initial citation omitted).

The Referee's recommendation is also informed by the Florida Standards for Imposing Lawyer Sanctions ("Standards") and relevant case law. *The Florida Bar*

v. Scott, 39 So. 3d 309 (Fla. 2010). The Referee must also consider any aggravating or mitigating factors, *The Florida Bar v. Marke*, 669 So. 2d 247 (Fla. 1996), mindful that these "standards" and "factors" are "not designed to propose a specific sanction for the myriad of fact patterns in cases involving lawyer misconduct." Standards, p. 1. Rather, they "provide a theoretical framework to guide" the decision making process, *Id.*, recognizing that the ultimate sanction imposed "must reflect the circumstances of each individual lawyer..." *Id.* at p. 10. The Referee may also consider the lawyer's level of scienter, the injury (or lack thereof) resulting from the lawyer's misconduct, and any need to protect the public from further transgressions. *Id.* at pp. 17-18.

There is no question, as the Bar points out, that suspension may be "appropriate when a lawyer knows of a conflict among several clients, but does not fully disclose the possible effect of multiple representation, and causes injury or potential injury to one or more of the clients." Standards, p 25. *See also, The Florida Bar v. Marke*, 669 So. 2d 247 (Fla. 1996) (adopting referee recommendation of a thirty day suspension for violations of rule 4-1.7(a), 4-1.7(b) and 4-1.9(a)). And the Supreme Court has imposed lengthy suspensions in cases involving particularly egregious conduct involving conflicts of interest. *See, e.g., The Florida Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009) (attorney who failed to disclose a clear conflict in order to protect his own investment, thereby causing "actual harm to the client"

suspended for 18 months); *Adorno, supra* (attorney who misused the "class action mechanism" and "abandoned" absent class members in order to receive multimillion dollar fee suspended for 3 years); *The Florida Bar v. Head*, 27 So. 3d 1 (Fla. 2010) (ordering one year suspension of lawyer who intentionally – and for monetary gain - created a conflict of interest by convincing clients to pay him $10,000.00 from the proceeds of a mortgage financing).

In this Referee's opinion this case does not resemble these cases or other cases cited by the Bar involving "egregious" misconduct found to be "dishonest and deceitful". *The Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010). While Gerson and Hunter were no doubt motivated, *in part*, by a desire to receive a fee and "close out" hundreds of difficult – and possibly unwinnable – cases, their prime motivation was to secure judicial oversight of the Foundation and obtain some monetary relief for clients who: (a) had suffered illnesses as a result of exposure to second hand smoke; and (b) were denied direct compensation because the tobacco industry – at the time of the 1997 agreement – steadfastly refused to pay them anything.[16]

Furthermore, at the time the Petition was filed Respondents – on behalf of their progeny clients supporting it – raised legitimate concerns over whether FAMRI had spent its funds for the benefit of flight attendant class members, and why this

[16] Gerson, Hunter and Alvarez testified that by 2010 the Tobacco companies' lawyers had advised them that their clients no longer cared whether the flight attendant class members received compensation from FAMRI. That testimony was uncontroverted.

Foundation had *never* been subjected to court supervision. Hundreds of progeny class members desired – and authorized – counsel to pursue these valid inquiries. And to the extent the Petition sought judicial oversight and an accounting of how FAMRI had spent its funds it was not – and could never be - "directly adverse" to the interests of *any* class members. To the contrary, judicial oversight and accountability was promised at the time the settlement received approval and securing it – as promised – was clearly in the interests of all class members – without exception.

Thus, had the Petition sought *only* judicial oversight and a review of expenditures no conflict would have been presented. The problem was that the Petition, as drafted, went further by accusing FAMRI (and hence its Trustees) of misusing funds and by seeking a distribution. For this reason it sought relief that was "directly adverse" to the interests of Young and Blissard – two class members who each were being paid $60,000.00 per year to serve on the board. It also was "directly adverse" to the interests of other class members who were purportedly "satisfied" with the way FAMRI had conducted its affairs despite no judicial oversight or transparency. So *certain* of the relief sought in the Petition placed counsel in a position where some clients favored their pursuit of the claims while others did not. Of course the two most vocal "objectors" were Young and Blissard. But as one Bar investigator aptly noted, for Young and Blissard "as Board Members

of an institution dedicated to benefit a 60,000 member class, to torpedo a possible recovery for the class to save their own board positions is a conflict of a different sort but no less disturbing." TE-40, p. 14.

In any event, faced with this "conflict" counsel was confronted with a number of issues that – quite frankly – were unsettled prior to our Supreme Court's decision in *Young*. Hunter, who clearly had a direct conflict with Blissard, believed that he had a right to withdraw from her representation, "convert" her to a former client, and argue that he should not be disqualified because the Petition against FAMRI was not "substantially related" to the individual personal injury cases. At that time the comment to Rule 4-1.7 seemed to support that protocol and no Florida appellate court had adopted the so-called "hot potato" rule. Furthermore, the question of whether the Petition and individual personal injury lawsuits were "substantially related" for purposes of Rule 4-1.9 (assuming these were "former" clients) was clearly debatable. It is true that "but-for" the underlying litigation there would be no foundation – and hence the matters were "related" in a general sense or, as Justice Canady put it at oral argument in *Young,* "intertwined." But the question of whether the two claims were "substantially related" for purposes of applying our conflict rules was 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. While our Supreme Court disagreed, the point is that the

question was again debatable. Thus, with respect to Blissard, Hunter had colorable – albeit losing – legal arguments in opposition to disqualification.

Also fairly debatable was the question of whether the Petition sought any relief "directly adverse" to those objecting class members who were *not* members of FAMRI's board. As discussed earlier, the 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. In fact the parties have not cited – and this Court could not locate – a single Florida appellate case that even discusses this issue. At one end of the spectrum, and as the comment to Rule 4-1.7 explains, the rule prohibits a lawyer from acting as an "advocate" against a person the lawyer represents in some other matter...." Thus, a lawyer cannot represent one client suing another client. To do so would obviously be "directly adverse" to the client's legal interests. At the other end of the spectrum, a client clearly cannot prevent the lawyers from asserting a claim on behalf of another client just because she "wishes" that it not be brought. So, for example, a client could not preclude her lawyer from suing a public company merely because she "likes" – does business with – or owns shares of – the target defendant. While the client might not be "happy" to find out that her lawyer brought such a claim, it would not be "directly adverse" to her legal interests.

This case fell somewhere in the middle. Though the Supreme Court – and this Referee – have *now* concluded that the Petition was "directly adverse" to the

interests of those clients who sought to protect FAMRI, and who objected to the filing, the issue of "direct adversity" was undoubtedly debatable; particularly given the fact that success on the claims advanced in the Petition could not have possibly caused any class member (other than Blissard and Young) financial or legal harm even if, in a worst case scenario, FAMRI had been totally dismantled. Thus, any "adverse interest" these flight attendants may have possessed was remote and speculative at best. For this reason, Respondents had a good faith – albeit again losing – argument in resisting disqualification based on objections from Waerness, Spurgeon and Chambers.

The question of whether a so-called "balancing" test – as opposed to a strict application of rule 4-1.7 and 4-1.9 – should be utilized in this unique context also was fairly debatable prior to our Supreme Court's opinion in *Young*, as amply shown by the fact that a unanimous panel of our intermediate appellate court agreed with Respondents' position and reversed the disqualification order. Two grievance committees also found no probable cause for discipline.

The bottom line is that the general legal principles to be applied here were subject to debate, as were application of those general principles in the context of this highly unusual hybrid type of case. *See, e.g., Arden v. State Bar of Cal.*, 52 Cal. 2d 310, 341 P.2d 6 (1959) ("[o]n this issue the members of the Bar have expressed opposite views.... The issue is a highly debatable one. No clear-cut rule on the

subject has been announced. It is not proper to discipline an attorney for a violation of a claimed principle that was and is so highly debatable").

Relevant to the question of discipline, the Court also finds significant the absence of any evidence in this record suggesting – let alone proving – that Gerson or Hunter actually used *any* "confidential" or "sensitive" information disclosed by their clients for purposes of preparing or filing the Petition. Rather the Petition was based largely upon the commonly known fact that no judicial oversight of FAMRI had occurred in over a decade, as well as questionable expenses that were discoverable via public record searches. No information at all provided by any progeny clients – Young and Blissard included – was used to develop the facts alleged or legal theories advanced. Thus, no progeny client was harmed – financially or otherwise – by counsel's *actual* use of any confidential or sensitive information disclosed during their attorney/client relationship.

Next, the Referee finds it significant that this case involves none of the most troubling aggravating factors legislated in the "Standards." Instead the only two in play are Respondents' "refusal to acknowledge" the wrongful nature of the conduct, and their "substantial experience in the practice of law." Standard 9.2 (a) and (i). This is not a case involving a "pattern of misconduct," "multiple offenses," a "dishonest" motive, "bad faith obstruction" within the disqualification proceeding

or related civil case, or other "deceptive practices." *Id.* The Referee also finds that the circumstances warrant the application of at least four (4) mitigating factors.

First, neither Respondent has any disciplinary history. *See* Standard 9.32(a). They are experienced lawyers who have practiced for decades without incident. The Referee also finds that they were not impelled by a "dishonest or deceitful motivation," Standard 9.32(b), and that they fully cooperated in all grievance proceedings. Standard 9.32(e). They also enjoy a strong reputation in the community, as testified to by Senior United States District Judge Lawrence King and former Florida Bar President Frank Angones, *see* TE-77.

Finally, the Referee concludes that suspension is not needed in order to protect the public, encourage rehabilitation, or deter others who might be prone to becoming involved in like conduct. This Referee has no doubt that this was a one-time transgression; that the circumstances presented here were highly unusual; that the disqualification question presented novel and unsettled legal issues; that the "conflict" that arose with clients Young and Blissard was caused, in part, by their decision to step outside their role as pure "class members" and serve on FAMRI's board for a substantial yearly salary; and that the question of whether the Petition sought relief "directly adverse" to all class members other than Young and Blissard was a close call.

In sum, the case was – in this Court's opinion – a proverbial black swan and outlier, both procedurally and substantively. And while this Court does not condone counsel's conduct, and finds that they exercised poor judgment, it concludes that given the totality of the circumstances presented the sanction of an "admonishment" is warranted and appropriate. *See* Standard, § 2.6. Respondents, who have practiced for decades without incident, have now been through two (2) grievance proceedings, trial and appellate proceedings through our Supreme Court, and a full disciplinary trial. The Referee is convinced that they are no risk to the public, or current or future clients, and that from this point forward they will be more – indeed far more – diligent in erring on the side of caution.

X. Conclusion

For the foregoing reasons the Referee respectfully recommends that Respondents be found guilty of violating Rule 4-1.7 of the Rules Regulating The Florida Bar and disciplined in the form of an admonishment. The Referee further recommends that pursuant to Rule 3-7.6(q) reasonable costs be awarded to the Bar as the prevailing party. The Referee believes this recommendation is reasonably supported by existing case law and not "clearly off the mark." *The Florida Bar v. Dunagan*, 731 So. 2d 1237, 1242 (Fla. 1999). The Referee thanks our Supreme

Court and Eleventh Judicial Circuit Chief Judge Bertila Soto for this appointment and the opportunity to serve in this most important role.

Respectfully submitted,

MICHAEL A. HANZMAN
Referee
Dade County Courthouse
73 West Flagler Street, Room 804
Miami, Florida 33130
(305) 349-7082

Chief Judge Bertila Soto, 11th Judicial Circuit
Thomas Kroeger, Esquire
Adria E. Quintela, Esquire
Steven Hunter, Esquire
John Weiss, Esquire
David Pollack, Esquire