IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PHILIP MAURICE GERSON,

Respondent.

_____/

Supreme Court Case No.

The Florida Bar File No. 2014-70,729(11C)

COMPLAINT OF THE FLORIDA BAR

The Florida Bar files this Complaint against Philip Maurice Gerson, Respondent, pursuant to the Rules Regulating The Florida Bar and alleges:

JURISDICTIONAL STATEMENT

1. Respondent is, and at all times mentioned in the Complaint was, a member of The Florida Bar, admitted on November 13, 1970, and subject to the jurisdiction of the Supreme Court of Florida.

2. Respondent resided and practiced law in Miami-Dade County, Florida, at all times material.

3. The Board of Governors has found probable cause to file this Complaint pursuant to Rule 3-7.5(c) of the Rules Regulating The Florida Bar. This Complaint has been approved by the presiding chair of the grievance committee.

BACKGROUND

4. The conduct forming the basis for this Complaint was brought to the attention of The Florida Bar when this Court published its opinion in the case styled Young, et al. v. Achenbauch, et al., 135 So.3d 575 (Fla. 2014). In the opinion, this Court held that the Third District Court of Appeal had erred in failing to apply the Florida Rules of Professional Conduct when it quashed a trial court's order disqualifying several attorneys, including Respondent. After applying Rules 4-1.7 and 4-1.9 of the Rules of Professional Conduct, this Court reversed the Third District's decision and reinstated the trial court's order, concluding that Respondent, along with attorney Steven Hunter, had engaged in a conflict of interest which warranted disqualification. A copy of the opinion is attached to this Complaint as Exhibit "A".

5. The proceedings in Young v. Achenbauch stem from class action litigation initiated by flight attendants against tobacco companies over diseases caused by second-hand smoke exposure in airplane cabins. Those cases, Ramos v. Philip Morris Cos., Inc., 743 So.2d 24 (Fla. 3d DCA 1999), rev. dismissed, 743 So.2d 14 (Fla. 1999) and Broin v. Philip Morris Cos., Inc., 641 So.2d 888 (Fla. 3d DCA 1994) culminated in a settlement whereby class members waived their intentional tort and punitive damages claims, but retained their right to pursue individual compensatory claims. In exchange, the tobacco companies waived the

statute of limitations and established a $300 million settlement fund which was used to fund the Flight Attendant Medical Research Institute (FAMRI). FAMRI's stated purpose was to sponsor scientific research into second-hand smoke related diseases, early detection and potential cures.

6. After the settlement, some flight attendants who had been members of the class pursued individual compensatory claims against the tobacco companies.

7. Respondent was one of several attorneys who prosecuted these progeny suits on behalf of former class members.

8. During the course of Respondent's representation, he and other attorneys representing flight attendants became concerned that FAMRI was not acting in accordance with its intended purpose of sponsoring scientific research. On December 1, 2010, Respondent, along with attorneys Steven Hunter and Alex Alvarez, filed a petition on behalf of flight attendant class members in Broin seeking the disbursement of FAMRI's remaining funds to the class members, an accounting of FAMRI, and an injunction prohibiting further expenditures without court approval.

9. Alani Blissard and Patricia Young (who were former class members who had pursued individual claims and were also members of FAMRI's board of trustees), and FAMRI itself, moved the trial court to disqualify Respondent, Hunter and Alvarez based upon a conflict of interest.

10. In support of their motion to disqualify, the movants submitted several sworn affidavits.

11. In their affidavits, both Blissard and Young expressed their belief that all of the attorneys prosecuting their cases functioned as a team. Although Respondent was neither Blissard nor Young's attorney of record, they both considered all of the lawyers in the group to be their attorneys, and they communicated frequently to discuss trial strategy and other litigation matters. As for Young, she stated that she often shared confidential information with the entire team regarding FAMRI and its internal processes. She also averred that Respondent and Hunter asked her to solicit funds from FAMRI to cover litigation costs. Both Young and Blissard voiced their objection to the petition against FAMRI and expressed a sense of betrayal that the attorneys would seek to undo FAMRI's work.

12. An additional affidavit was submitted by Raiti Waerness, one of Respondent's clients. In her affidavit, Waerness stated that she wrote to Respondent once she learned of the potential action against FAMRI, at which point he withdrew from her case.

13. The movants also included as an exhibit an email sent by Peggy Spurgeon, another of Respondent's flight attendant clients, in which she expressed her opposition to the action against FAMRI.

14. Respondent submitted an affidavit in opposition, denying an attorney-client relationship with Young and Blissard, and stating that his representation of Waerness and Spurgeon was limited to filing their initial complaints.

15. As to Young, Respondent stated that he never entered into any agreement for representation, never provided any legal services and had never received any information from her about FAMRI's operations. He denied having any conversations with Young regarding litigation funding requests.

16. With respect to Blissard, Respondent again averred that he did not have an attorney-client relationship with her and had not provided her with any legal services. He stated that he had no telephonic or written communications with her, had not learned any internal information about FAMRI from her, and had never reviewed her file or any pleadings relating to her case.

17. As for Waerness, Respondent claimed he had only filed her initial complaint at the request of Broin class counsel, had never met her or spoken with her, and had never obtained any information from her. Once Waerness expressed her objection to the petition against FAMRI, Respondent voluntarily withdrew from her individual action.

18. Respondent similarly stated that he filed a complaint on behalf of Spurgeon only at the request of class counsel, and that she never executed a

retainer, never met with him, never contacted him, never provided any information to him, and that her case was dismissed in 2008.

19. Ultimately, the trial court entered an order disqualifying Respondent, Hunter and Alvarez (as well as four additional attorneys who had joined after the petition was filed), finding that their attempt to vacate or modify the settlement establishing FAMRI violated Rules 4-1.7 and 4-1.9 of the Rules of Professional Conduct.

20. Respondent and Hunter sought certiorari review with the Third District Court of Appeal. The Third District elected not to apply the Rules of Professional Conduct to the issue of disqualification, and instead utilized the balancing text employed in the federal courts. Using this analysis, the Third District concluded that the benefit of Respondent and Hunter's counsel to the other class members outweighed the prejudice to Blissard, Young and the other objectors. In addition, the Third District concluded that action against FAMRI, while arising from the earlier litigation in Broin, was a separate matter.

21. In turn, this Court quashed the Third District's decision because it failed to apply Rules of Professional Conduct in determining whether the trial court abused its discretion in granting the disqualification. This Court concluded that disqualification of Respondent and Hunter was warranted for engaging in conflicts of interest in violation of Rules 4-1.7 and 4-1.9 of the Rules of

Professional Conduct. This Court further asked The Florida Bar to initiate a disciplinary investigation into whether any Rules of Professional Conduct were violated during the underlying proceedings or during the presentation of the case to the Court.

COUNT ONE: RULE 4-1.7 (CONFLICT OF INTEREST; CURRENT CLIENTS)

22. Paragraphs 1 through 21 are realleged and incorporated as though fully set forth herein.

23. Respondent represented Waerness and Spurgeon in their individual actions against tobacco companies, filing complaints on behalf of each in September of 2000.

24. Respondent also coordinated with other attorneys representing flight attendant clients, joining in a team approach and pooling litigation information.

25. In or about early 2010, Waerness learned that Respondent intended to take action against FAMRI. On April 27, 2010, Waerness sent correspondence to the Executive Director of FAMRI stating her opposition to any such action. A copy of this correspondence was provided to Respondent.

26. Also in April of 2010, Spurgeon sent Respondent an email objecting to his taking any adverse actions against FAMRI.

27. On May 4, 2010, Respondent sent Waerness a letter stating that he did not wish to act contrary to her wishes, and would withdraw from her case if she so desired. On May 28, 2010, Respondent filed his motion to withdraw.

28. At this point, Respondent was on notice that any action against FAMRI would be directly adverse to the stated interests of Waerness and Spurgeon.

29. Respondent's duty of loyalty to his clients precluded him from undertaking any representation which would be directly adverse to them, and this conflict could not be avoided by converting those clients into former clients by withdrawing from their cases.

30. Nonetheless, Respondent proceeded to join the Petition to Enforce and Administer Mandate which effectively sought to dissolve FAMRI and disburse any remaining funds to class members.

31. Consequently, Respondent engaged in representation in which the interests of some of his flight attendant clients were directly adverse to others.

32. By virtue of the foregoing, Respondent has violated Rule 4-1.7 of the Rules of Professional Conduct.

COUNT TWO: RULE 4-1.9 (CONFLICT OF INTEREST; FORMER CLIENT)

33. Paragraphs 1 through 32 are realleged and incorporated as though set forth fully herein.

34. The original class action in Broin resulted in the settlement agreement which established FAMRI and provided for individual progeny suits by flight attendants against tobacco companies.

35. Respondent represented some of the former class members in these individual progeny suits and coordinated with other attorneys and their flight attendant clients, including Young and Blissard, by pooling and sharing litigation information.

36. This team approach utilized by Respondent and the other attorneys created a situation whereby the attorney for one client became the attorney for the other.

37. The petition filed by Respondent accused FAMRI of failing to comply with the terms of the settlement mandate established by the original class action.

38. More specifically, Respondent claimed that FAMRI had failed to produce research into second-hand smoke related diseases, and that this lack of research was a substantial reason for the disappointing outcomes in the individual cases.

39. The settlement resulting from the class action, the individual lawsuits and the petition against FAMRI are substantially related matters, involving the same transaction or legal dispute.

40. The interests of those clients who Respondent continued to represent in the petition against FAMRI were materially adverse to the interests of his former clients who opposed the petition or had not given consent.

41. As to the former clients, by virtue of the team approach utilized, there is an irrefutable presumption that Respondent learned confidential information which he then used against them.

42. By virtue of the foregoing, Respondent has violated Rule 4-1.9 of the Rules of Professional Conduct.

WHEREFORE, The Florida Bar prays, Philip Maurice Gerson, will be appropriately disciplined in accordance with the provisions of the Rules Regulating The Florida Bar as amended.

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CERTIFICATE OF SERVICE

I certify that this Complaint of The Florida Bar has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-filing Portal; that a copy has been furnished by United States Mail via certified mail No. 7016 0750 0000 3623 6242, return receipt requested to Philip Maurice Gerson, Respondent, whose record bar address is Gerson & Schwartz P.A., 1980 Coral Way, Miami, Florida 33145 and via email at pgerson@gslawusa.com; and via email only to Thomas Allen Kroeger, Bar Counsel, The Florida Bar at tkroeger@flabar.org, on this 6th day of June, 2016.

Adria E. Quintela
ADRIA E. QUINTELA
Staff Counsel

NOTICE OF TRIAL COUNSEL AND DESIGNATION OF PRIMARY AND SECONDARY EMAIL ADDRESS

PLEASE TAKE NOTICE that the trial counsel in this matter is Thomas Allen Kroeger, Bar Counsel, whose address, telephone number, primary and secondary email addresses are The Florida Bar, Miami Branch Office, 444 Brickell Avenue, Rivergate Plaza, Suite M-100, Miami, Florida 33131-2404, (305) 377-4445 and tkroeger@floridabar.org and abowden@floridabar.org. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Adria E. Quintela, Staff Counsel, The Florida Bar, Lakeshore Plaza II, Suite 130, 1300 Concord Terrace, Sunrise, Florida 33323, aquintel@floridabar.org.

MANDATORY ANSWER NOTICE

RULE 3-7.6(h)(2), RULES OF DISCIPLINE, EFFECTIVE MAY 20, 2004, PROVIDES THAT A RESPONDENT SHALL ANSWER A COMPLAINT.