IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
v.
STEVEN KENT HUNTER,
and
PHILIP 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)

# INITIAL BRIEF OF THE FLORIDA BAR

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## PRELIMINARY STATEMENT

For the purposes of this Brief, Steven Kent Hunter will be referred to as "Hunter", Philip Maurice Gerson will be referred to as "Gerson", and jointly, the two will be referred to as "Respondents". The Florida Bar will be referred to as "The Florida Bar" or "the Bar". The Rules Regulating The Florida Bar will be referred to as the "Rules" and Florida's Standards for Imposing Lawyer Sanctions will be referred to as the "Standards".

References to the report of referee shall be by the symbol "ROR" followed by the appropriate page number (e.g., ROR: 12). References to the transcripts of the final hearing will be by the symbol TR, followed by the volume, followed by the appropriate page number (e.g., TR III: 289). References to trial exhibits shall be by the symbol "TE" followed by the appropriate exhibit number and, where applicable, page number. (e.g., TE 3: 10).

For ease of reference, several documents appended to the trial exhibits have been included the accompanying appendix, and references thereto shall be by the sequence number (e.g., A1).

## STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar seeks review of a report of referee finding Respondents guilty of violating Rule 4-1.7 of the Rules of Professional Conduct, not guilty of violating Rule 4-1.9, and recommending an admonishment for minor misconduct.

### Introduction

This is not the first time this Court has been called upon to review Respondents' conduct. In *Young v. Achenbauch*, 136 So. 3d 575 (Fla. 2014), this Court held that Respondents were properly disqualified under Rules 4-1.7 and 4-1.9 from representing a group of flight attendants in a petition against the Flight Attendant Medical Research Institute which sought relief adverse to some of their own clients. Apropos to these disciplinary matters, the *Young* opinion asked the 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." *Young*, 136 So. 3d at 577.

Following grievance committee proceedings and findings of probable cause pursuant to Rule 3-7.5(c)(7) of the Rules of Discipline, the Bar filed formal complaints against the Respondents on June 6, 2016, alleging violations of Rules 4-1.7 and 4-1.9. The cases were consolidated and proceeded to a final hearing on

December 27, 2016, and December 28, 2016. The report of referee was docketed on January 30, 2017.

### ***Broin*** **Class Action Litigation**

The conflicts at issue in *Young*, and by extension these disciplinary proceedings, have as their predicate a class action initiated in 1991 by flight attendants against tobacco companies for illnesses caused by exposure to second-hand smoke in airline cabins. *See Ramos v. Philip Morris Cos., Inc.*, 743 So. 2d 24 (Fla. 3d DCA 1999), *rev. dismissed*, 743 So. 2d 14 (Fla. 1999); *Broin v. Philip Morris Cos., Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (Fla. 1995. Represented by Stanley and Susan Rosenblatt, the action proceeded to trial in June of 1997. *Ramos*, 743 So. 2d at 27. On October 10, 1997, mid-way through trial, the parties submitted a proposed settlement agreement to the court. *Id.*

The agreement did not provide for any direct compensation to class members. Instead, in exchange for waiving their punitive damage claims, class members were given the right to file individual compensatory actions with a host of procedural and substantive benefits. *Id.* For instance, the agreement permitted class members to file their actions during a limited window in which the defendants would waive any statute of limitations defenses. *Id.* In addition, the

defendants agreed to burden shifting provisions on "generic causation" as to certain diseases caused by second-hand smoke, allowed each flight attendant to proceed in their home venue, and agreed not to challenge personal jurisdiction or service of process. (TE 1: 9, 10.)

Beyond these litigation benefits, the agreement called for tobacco companies to pay $300 million to establish a foundation to "sponsor scientific research with respect to the early detection and cure of diseases associated with cigarette smoking." (TE 1: 7.) This foundation was to be "managed and directed by a Board of Trustees nominated by Class Counsel" and "governed in accordance with a trust instrument, subject to approval by the court." (TE 1: 9.)

The agreement stated that if the trial court did not approve it as originally drafted, or if an appellate court modified it in any way, it would be cancelled and terminated, and the parties returned to their original positions. (TE 1: 14, 15.) If approved, all claims (except the individual compensatory actions) would be dismissed with prejudice. (TE 1: 6.)

Over the opposition of a small contingent of objectors, the trial court approved the settlement, concluding the agreement provided "substantial benefits to all class members." (TE 2: 37.) This order was affirmed on appeal by the Third District Court of Appeal, which also found that the agreement was "fair, adequate

and reasonable" and provided "*abundant*" benefits. *Ramos* at 31. The Third District noted the importance of the waiver of statutes of limitation defense, which presented "a *serious* problem for *most, and close to all* of the class members," as well as the "significant victory" of the burden-shifting provision on generic causation. *Id*. at 31-2. Finally, the Third District rejected any objections to the foundation fund, noting that there was no indication that the defendants would have settled "if the money [was] to be paid directly to class members." *Id*. at 33.

The settlement having been formally approved, the trial court ordered that that the Flight Attendant Medical Research Institute ("FAMRI") have immediate access to the $300 million and begin operating "in accordance with the By-Laws and Articles of Incorporation and orders and directions of the Board of Directors and Trustees of the Foundation." (TE 5.) FAMRI's Board of Trustees included the Rosenblatts, flight attendant class representatives Alani Blissard and Patricia Young (and two other former class members), and former attorney ad litem for absent class members, John B. Ostrow, (TE 6: 4). Under the regulation of state and federal laws governing non-profit foundations, FAMRI began its research operations.

## *Broin* Progeny Actions

While not involved in the underlying class action, Respondents, along with several other personal injury attorneys, were recruited by class counsel in 2000 to represent flight attendants in the individual compensatory actions. (TR I: 62-4, TR II: 271-72.) Hunter filed complaints on behalf of approximately 330 former flight attendants; Gerson filed complaints on behalf of approximately 600. (TR II: 272; TR I: 64.) In all, roughly 3,000 *Broin* progeny cases were filed in Miami-Dade County. *Philip Morris Inc. v. French*, 897 So. 2d 480, 483-84 (Fla. 3d DCA 2004). The group of lawyers representing individual flight attendants, which included Miles McGrane, Marvin Weinstein, and later, Alex Alvarez, met regularly to discuss issues of common interest, pooled litigation information, and tried cases together. (TR I: 67-70; TR II: 202-03; TR III: 272-74, 279-80.)

Young and Blissard were among those flight attendants who pursued individual actions. Young directly retained McGrane, while Blissard retained Hunter. (TE 23: 3; TE 30.) Former flight attendants Olivia Rossi Chambers, Raiti Waerness and Peggy Spurgeon also pursued progeny actions. Chambers retained Hunter, and Gerson filed complaints on behalf of Waerness and Spurgeon. (TE 21: 2; TE 30; TE 28: 4, 5.)

During the decade following the settlement, only eleven cases proceeded to trial, and of those, ten resulted in defense verdicts. (TR I: 79; TE 18: 8.) The remaining thousands of cases languished with little record activity, and many were dismissed for lack of prosecution. (TR I: 117; ROR: 12.) Having decided that they stood little chance of prevailing in the individual cases because of insufficient scientific research on "specific causation," the group of attorneys sought an alternative route to financial recovery. Concluding FAMRI was at fault for failing to produce any valuable scientific research, and believing it was no longer serving the interests of the class, the attorneys looked to its research funds as the key to unlocking a financial resolution for the individual flight attendant cases. (TR I: 83, 88; TR II: 207-09; TR III: 279; TE 18.)

**Attempts to Obtain FAMRI Funds**

This resolution, which would modify the *Broin* settlement agreement to allow FAMRI to compensate flight attendants directly, was first proposed in 2009 by McGrane. (TR I: 87-8, TR II: 208-09; TR III: 279, 281.) In early 2010, Alvarez provided the Rosenblatts—who remained on FAMRI's Board of Trustees—with a draft of a petition seeking FAMRI's cooperation in distributing a portion of its funds directly to flight attendants who had pursued progeny actions. (TR II: 209.) In a follow up e-mail, Alvarez explained that their proposal would ensure

"FAMRI's continued existence and good work" and achieve "[c]losure for the Flight Attendant Litigation." (TE 7.)

Following preliminary discussions, the parties agreed to a mediation with attorney Andrew Hall, which took place on April 28, 2010. (TR I: 96, 101; TR II: 213.) Lasting less than an hour, it resulted in an impasse when Hunter and Gerson were handed letters authored by three of their progeny clients—Blissard, Waerness and Spurgeon—asserting conflicts of interest. (TR I: 99-103; TR II: 213-24; TR III: 304-05.)

In Blissard's letter to Hunter, she conveyed her objection, stating:

> As Trustees, [Young] and I have been accused of not following our mission and not helping or benefiting flight attendants through funded research. This is simply not true. However, even if it were, you, who represents me, and the other counsel cannot sue FAMRI when your client—me—is harmed by your actions. All other flight attendants are also harmed if FAMRI is harmed, and I strongly oppose what you are doing.
>
> We want compensation from tobacco companies that caused our disease and medical conditions, not from FAMRI. I certainly do not want you or any of your group of Gerson, Alvarez, Paige and Trop to bring any claims against FAMRI or sue FAMRI for any reason.
>
> (A1.)

Similarly, Gerson's clients, Spurgeon and Waerness, voiced their objection in correspondence submitted to Elizabeth Kress, Executive Director of FAMRI. In her e-mail, Spurgeon wrote:

> 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 effects 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 impact me, your client, and other flight attendant clients.

(TE 8.) And in her correspondence, Waerness stated:

> 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.)

Undeterred by these objections, Respondents sought to convert Blissard, Waerness and Spurgeon into former clients in an attempt to avoid the conflict. Hunter immediately moved to withdraw from Blissard's case, even though he had represented her for ten years. (TR III: 309.) His motion was granted on June 24, 2010 (TE 75.) Gerson wrote letters to Spurgeon and Waerness, informing each that he would not take any action on their behalf of which they disapproved, and offered to withdraw from their cases. (TE 13; TE 12.) Waerness responded, stating that she did not want Gerson to withdraw from her case fearing it would be difficult to find successor counsel. (TE 14.) She reiterated that she wished for him to remain as her attorney *and* refrain from taking any action adverse to FAMRI.

(TE 14.) Contrary to her wishes, Gerson moved to withdraw from her case on May 25, 2010. (TE 16.) Finally, despite his offer to withdraw from Spurgeon's case, Gerson had already allowed it to be dismissed for lack of prosecution in 2008. (TE 6.)

Convinced these actions satisfied their ethical obligations, Respondents, along with Alvarez and other plaintiffs' attorneys, continued to try and negotiate a resolution with the Rosenblatts and FAMRI throughout the remainder of 2010 (TR I: 119-132; TR II: 215-222; TR III: 309-10.) One notable exception was McGrane, who, having received a similar objection from Young, declined to join in any further discussions or actions against FAMRI. (TR I: 110-11; TE 11.) Ultimately, the negotiations failed, and on December 1, 2010, Respondents, along with Alvarez, filed the "Petition to Enforce and Administer Mandate" ("Petition") on behalf of "flight attendant class members" in the *Broin* class action. (TE 18: 1).

The Petition did not make clear whether it was filed on behalf of all class members, those former class members who Hunter, Gerson and Alvarez represented, or all 3,000 flight attendants who had filed progeny actions. It alleged that "FAMRI through its Board of Directors has substantially deviated from the Court's approved purposes and has misused the settlement funds." (TE 18: 2.) Instead of benefiting flight attendant class members, the Petition asserted that

settlement funds "have been expended for purposes not approved by the court and otherwise misused." (TE 18: 2.) It claimed that the progeny lawsuits were "unproductive, expensive and time consuming," that the original settlement provided no "meaningful strategic benefit," and that the losing trial record was the result of FAMRI's failure to "establish scientific evidence to support disease causation in their cases." (TE 18: 8-9.)

Prior negotiations between progeny counsel and FAMRI representatives contemplated the distribution of only a portion of FAMRI's funds, leaving FAMRI's "continued existence and good work" largely unaffected (TR I: 151; TR II: 209-10; TR III: 312-13; TE 7.) The Petition's language, however, contained no such limitation, proceeded to impugn FAMRI's legitimacy, and challenged its future existence. It maintained that FAMRI—from its very creation—had strayed from its court-approved purpose and had not provided any contemplated benefit to class members. (TE 18: 4-6.) As relief, the Petition requested the trial court make findings that FAMRI had not fulfilled its purpose, "order distribution of the settlement funds to class members," order an "accounting of all funds received and expended," and enjoin any further expenditures "not expressly approved" by the court. (TE 18: 10.)

Finally, although none were filed with the trial court until well after the Petition itself, Respondents requested authorization "forms" from their progeny clients allowing them to proceed with the action against FAMRI. (TR I: 176-78; TR III: 359-61; A2; A3.) In correspondence to their clients seeking this authorization, Respondents included an "update" on the status of the litigation. In his letters, Gerson criticized the original settlement, characterized the progeny suits as unwinnable, and accused FAMRI's board members of misusing funds (A2.) He proposed modifying the original settlement "to pay *all* available remaining funds to the individual flight attendants on an equal basis." (A2.) (emphasis added). Gerson closed by asking any clients who wished to pursue the action to agree to a fee of 30% for any recovery, and to sign and return the letter. (A2.) In Hunter's letters, which he did not even send until two months after the Petition had been filed, he similarly sought authorization "to seek distribution of remaining settlement monies directly to individual flight attendants," with contingent attorney's fees in the amount of 30 percent. (A3.)

**Disqualification Proceedings**

On May 23, 2011, FAMRI, Young and Blissard filed their Motion to Disqualify Respondents, Alvarez, and four additional attorneys who had joined the Petition after its filing. (TE 19.) The motion argued that the Petition sought relief

"materially adverse to the interests" of Young and Blissard, other former clients of Respondents, and former class members who "are satisfied with and have benefited from the Settlement Agreement." (TE 19: 16.) Further, the motion alleged that Hunter and Gerson engaged in "a fundamentally flawed attempt to cure the conflict of interest" between clients who supported taking action against FAMRI and those who objected to it when they "simply abandoned the clients who expressed opposition." (TE 19: 2.) As a result, the motion requested that Hunter, Gerson, Alvarez, and by imputation the four additional attorneys, be disqualified for conflicts in violation of Rules 4-1.7 and 4-1.9. (TE 19.)

In support of the motion were affidavits from Young, Blissard, Waerness, Chambers, and McGrane. In Young's affidavit, she averred that she was a former *Broin* class member and FAMRI board member, and frequently met with the group of attorneys representing flight attendants in their progeny actions. (TE 23: 3.) Although neither Hunter nor Gerson were her counsel of record, she viewed them as part of a "team effort" and considered "all the attorneys my attorneys and was close to them." (TE 23: 3.) She testified that she shared "confidential information regarding myself, the litigation and FAMRI with my attorneys working with Miles [McGrane], particularly Steven Hunter and Philip Gerson." (TE 23: 3.)

In Blissard's affidavit, she averred that she was also a *Broin* class representative and FAMRI board member, and had been represented by Hunter in her individual suit for ten years. (TE 22: 2). She testified that she had attended meetings and worked closely with the various counsel for the flight attendants, as they were all working as a team in pursuit of the individual claims. (TE 22: 2). She further averred that she "and other class representatives, Patty Young and Bland Lane, shared many confidences with them," including confidences regarding FAMRI. (TE 22: 3.)

In Chambers' affidavit, she testified that Hunter began representing her in her progeny suit in August of 2000. (TE 21: 2.) In February of 2011, after the Petition had already been filed, she received a letter from him seeking authorization to proceed on her behalf in the action against FAMRI. (TE 21: 2.) She wrote Hunter on February 23, 2011, objecting to the Petition and asking him "not to take this action." (TE 21: 2.) She stated she did not want Hunter and the other attorneys "to touch a penny of our research money in FAMRI" which was helping "me and other flight attendants detect our diseases earlier and help us to find cures." (TE 21: 3.) Shortly thereafter, she described receiving notice of Hunter's motion to withdraw from her case. (TE 21: 3-4.)

In Waerness' affidavit, she testified that Gerson was her attorney in her individual case, having filed her complaint in 2000. (TE 20: 2.) After not hearing from him for ten years, she described learning from a fellow flight attendant of the plan to "raid FAMRI for its assets." (TE 20: 2.) She felt that the action against FAMRI by Gerson, Hunter and Alvarez was "reprehensible as they attempt to line their own pockets on [sic] the guise of providing compensation to their clients." (TE 20: 2). She concluded by stating that she wanted "justice from the tobacco industry not from an organization trying to help me and other non-smoking flight attendants." (TE 20: 3.)

In McGrane's affidavit, he testified that Hunter, Gerson and Alvarez possessed unresolvable conflicts with many of their individual clients who were "very satisfied" with the settlement and objected "to any claim against FAMRI." (TE 24: 2.) With respect to Young and Blissard, McGrane averred that the Petition placed Respondents in litigation "directly adverse to their flight attendant clients who are board members of FAMRI." (TE 24: 2.) McGrane further testified to the close working relationship between the plaintiffs' attorneys and confirmed the confidences Young and Blissard had shared about FAMRI with the team of attorneys. (TE 24: 2.)

Hunter and Gerson submitted affidavits in opposition. In his affidavit, Hunter testified that he had been retained by Blissard, but withdrew from her case in June of 2010 after she objected to the proposed action against FAMRI. (TE 30: 1.) He denied representing her "with respect to her role as a member of the Board of Directors of FAMRI," or possessing any "confidential information" relative to her interactions with FAMRI. (TE 30: 2.) Similarly, he denied ever representing Young or receiving any information from her with respect to her progeny case or FAMRI. (TE 30: 2.) Finally, he acknowledged representing Chambers in her progeny action, but stated he immediately moved to withdraw when he learned of her objection to the Petition. (TE 30: 2.)

Similarly, Gerson testified in his affidavit that he had never received any confidential information about FAMRI or its board members. (TE 28: 2.) With respect to Blissard and Young, he averred that he never represented them or provided any legal services; knew nothing about their *Broin* progeny cases; never learned any information about FAMRI from them; and only had isolated contact with them. (TE 28: 3-4.) Likewise, he denied any contact with or knowledge of Chambers. (TE 28: 4) As for Waerness and Spurgeon, he testified that he filed their complaints at the request of Stanley Rosenblatt just days before the statute of

limitations window ran, but had no subsequent contact with either until he received letters objecting to his taking action against FAMRI. (TE 28: 4-5.)

Shortly before the hearing on the Motion to Disqualify, Philip Morris filed a statement opposing the Petition, noting that a "material term" of the original agreement was that the settlement funds would go "solely" to a foundation, and no monies would be paid to any "members of the purported plaintiff class." (TE 29: 1.) Since the Petition sought to compensate former class members directly from the remainder of the settlement fund, contrary to the terms of the original agreement, Philip Morris could "not agree to this proposed modification." (TE 29: 2.)

The trial court held its hearing on June 30, 2011. No party presented any live testimony, thus the trial court's decision was limited to the affidavits and documentary evidence admitted. (TE 33: 1, 4.) In its subsequent order, the trial court concluded that Hunter, Gerson and Alvarez, as well as the four attorneys who had joined the Petition, possessed conflicts of interest contrary to Rules 4-1.7 and 4-1.9. The court found that Hunter and Gerson violated the prohibition against representing interests adverse to current clients because they filed the Petition without the consent or authorization of many of their own clients, and over the specific objections of others. (TE 33: 1.7) Moreover, despite their counsel's representations to the contrary, the court concluded that the Petition purported to

represent *all* class members and, consequently, sought "to vacate and seek [a] refund for the entire class it does not represent." (TE 33: 15.)

As for conflicts with their former clients, the trial court found that the evidence established the two prongs necessary for disqualification: (1) the existence of an attorney-client relationship; and (2) actions taken by the attorney against the former client's interests in a matter substantially related to the matter in which the attorney previously represented the client. (TE 33: 14 (citing to *State Farm Mut. Auto Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991)).) Accordingly, the trial court found that Hunter and Gerson improperly converted Blissard, Young and Waerness into former clients after learning of their objections, and then proceeded to act against their interests in the action against FAMRI, which was substantially related to their progeny actions, as they both arose from the original settlement agreement. (TE 33: 12-15.)

**Review Before the Third District Court of Appeal and the Florida Supreme Court**

Dissatisfied with the trial court's order, Hunter and Gerson sought certiorari review before the Third District Court of Appeal. Concluding that Florida's Rules of Professional Conduct were "inadequate to resolve conflict of interest problems typical to class action cases," the Third District proceeded to adopt a test used by federal courts to balance "the actual prejudice of the objector with his or her

opponent's interest in continued representation by experienced counsel." *Broin v. Phillip Morris Cos., Inc.*, 84 So. 3d 1107, 1112 (Fla. 3d DCA 2012). Utilizing this test, the Third District concluded that the right of class members to be represented by Hunter and Gerson outweighed any prejudice to the movants, particularly given the fact that they were not class counsel in the original actions and therefore had little access to confidential information." *Id.* Finally, the opinion concluded that although the Petition arose from the class action, it presented a different issue, and thus was not substantially related. *Id*.

In turn, FAMRI, Young and Blissard petitioned for review in this Court, which accepted jurisdiction and quashed the Third District's decision. *Young v. Achenbauch*, 136 So. 3d 575 (Fla. 2014). The *Young* opinion rejected the Third District's use of the federal balancing test; reiterated that the "Rules of Professional Conduct provide the standard for determining whether counsel should be disqualified"; and concluded that the trial court did not abuse its discretion when it ruled that Hunter and Gerson violated Rules 4-1.7 and 4-1.9. *Id*. at 581.

Beyond this basic holding, the *Young* opinion made specific findings detailing Respondents' violations of Rules 4-1.7 and 4-1.9. As for Hunter, the opinion noted that he possessed a conflict under Rule 4-1.7 that "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, for ten years, and the petition against FAMRI accuses the board (including Blissard) of misusing funds." *Id.* at 582. His withdrawal "did not resolve this conflict or preclude the application of rule 4-1.7." *Id.* Likewise, Gerson's conflict should have been apparent after receiving notice from Waerness and Spurgeon that they objected to the action against FAMRI. *Id.* And, like Hunter, Gerson's withdrawal from Waerness's case after the fact did not "resolve the conflict or evade the applicability of rule 4-1.7." *Id.*

Further, even though neither Hunter nor Gerson represented Young directly, and Gerson was not direct counsel to Blissard, the "team approach" used by the attorneys representing flights attendants (and the "sharing of information and confidences") created a situation whereby the attorney for one became the attorney for the other. *Id.* (citing *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 440 n. 3 (Fla. 3d DCA 1987) and *Mansur v. Podhurst Orseck, P.A.*, 994 So. 2d 435, 438 (Fla. 3d DCA 2008)). Thus, the conflict in "pursuing the action against FAMRI should have been evident" as to both Young and Blissard. *Id*.

The *Young* opinion also found that Respondents violated Rule 4-1.9 because "the petition against FAMRI, the individual progeny suits, and the original class action" were "substantially related" and involved "the same transaction or legal

dispute." *Id.* at 583. Since the Petition "accused FAMRI of not living up to the settlement's mandate," claimed its lack of research was a "substantial reason" for the losing trial record, and sought to have its funds "dispersed to only a handful of the former class members," it was obvious that "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*.

**Disciplinary Proceedings**

Following the publication of the *Young* opinion, the Bar opened investigations into both Hunter and Gerson for potential violations of Rules 4-1.7, 4-1.9, 4-3.3, and 4-8.4(c) of the Rules of Professional Conduct. This marked the Bar's second investigation, as previous inquiries into Respondents' (and Alvarez's) actions resulted in grievance committee findings of no probable cause in February of 2012. (TE 40; TE 41; TE 42; TE 43.) After findings of no probable cause by the assigned grievance committee, the Disciplinary Review Committee of the Board of Governors ultimately recommended a finding of probable cause as to Rules 4-1.7 and 4-1.9, which was confirmed by the full Board. (TE 71.) Thereafter, the Bar filed its formal complaints.

The matters were consolidated and proceeded to a final hearing on December 27, 2016 and December 28, 2016. The parties stipulated to the admission of 77 exhibits. The Bar called no witnesses, relying instead on the ample record evidence developed in the disqualification proceedings and grievance committee investigations. Hunter testified on his own behalf, and in mitigation introduced the deposition transcript of attorney Francisco Angones and the live testimony of U.S. District Senior Judge James Lawrence King. (TE 77; TR III: 373-393.) Gerson also testified on his own behalf and called Alvarez as both a fact and character witness.

The referee's report was docketed with this Court on January 30, 2017. As a threshold matter, the report questioned whether the findings in *Young*, both legal and factual, were binding. Noting the requirement of clear and convincing evidence in disciplinary proceedings, coupled with Respondents' due process interests, the referee concluded that this Court's findings in *Young* were due deference, but "with the *exception* of pure legal holdings—are not binding in this disciplinary proceeding." (ROR: 32-3.) Accordingly, the referee determined that Respondents should be afforded the opportunity to "relitigate" disputed facts. (ROR: 32-3.)

Next, the report considered whether Rule 4-1.9 had any "application" to the proceedings. Although the *Young* opinion found violations of both Rule 4-1.7 *and* 4-1.9, the referee concluded that this Court's "adoption of the so-called 'hot potato' doctrine" discussed in *ValuePart, Inc. v. Clements*, 06 C 2709, 2006 WL 2252541 (N.D. Ill. Aug 2, 2006) precluded a factual analysis under Rule 4-1.9. (ROR: 30, 35-36.) Characterizing this as a "purely legal holding," the referee determined that "the same person cannot be both a 'current' and 'former' client for purposes of analyzing whether one case by counsel (filing and prosecuting the Petition against FAMRI) violated the Rules Regulating The Florida Bar." (ROR: 36.) Having reasoned that the objecting clients—Blissard, Young, Chambers, Waerness and Spurgeon—were either "current clients or not clients at all, and if they were current clients, they could not be converted to former clients by Gerson and Hunter's withdrawal," the Referee concluded Rule 4-1.7 was the only potential violation at play. (ROR: 36-7.)

With respect to Rule 4-1.7, the referee found, as did this Court in *Young*, that the Petition advanced claims directly adverse to the interests of FAMRI and its board members, including Blissard and Young. (ROR: 37.) The Petition alleged "in no uncertain terms" that FAMRI was deviating from its court-approved purpose and sought to disburse its funds to a subclass of flight attendant class

members. (ROR: 37.) Since Hunter represented Blissard, and she did not consent to an action which was directly adverse to her, Hunter was under a duty to refrain from pursuing the Petition. In going forward, he plainly violated Rule 4-1.7. (ROR: 37-8.)

As for Young, the referee rejected the Bar's argument, and this Court's finding in *Young*, that the "team approach" to the representation in the progeny cases created a situation whereby an attorney client relationship existed between Hunter, Gerson and Young. (ROR: 39.) Rather, the referee found the testimony of Respondents and Alvarez—who all claimed that Young never disclosed any confidential information about herself or FAMRI—more credible than the affidavits of Young and McGrane. (ROR: 40-2.) Finding a lack of clear and convincing evidence, the Referee concluded that no duty of loyalty could be imposed between Respondents and Young such that they were subject to the limitations of Rule 4-1.7. (ROR: 42.)

As for Chambers, Waerness and Spurgeon, the referee ultimately found that they, "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." (ROR: 46.) In rejecting Respondents' contention that they did not represent adverse interests, the Referee noted that the Petition "*could* have

dismantled (or at least severely disrupted) a Foundation [their clients] bargained for, provided consideration for, and firmly believed had—and would continue to—benefit those exposed to second hand smoke." (ROR: 46.). Accordingly, the referee found Hunter guilty of violating Rule 4-1.7 as to Chambers, and Gerson guilty of violating 4-1.7 as to Waerness and Spurgeon.

Turning to discipline, the referee concluded that because of the unsettled nature of the law prior *Young,* and the debatable application of those principles to this "highly unusual hybrid type of case," the misconduct did not warrant a suspension. (ROR: 53, 56.) While the referee recognized the applicability of aggravating factors 9.22(g) ("refusal to acknowledge wrongful nature of conduct") and 9.22(i) ("substantial experience in the practice of law") of Florida's Standards for Imposing Lawyer Sanctions, the report concluded that Respondents' conduct did not involve any of the "most troubling aggravating factors," i.e., a "pattern of misconduct," "multiple offenses," a "dishonest" motive, or "bad faith obstruction" of the disciplinary proceedings. (ROR: 54-5.) Instead, relying in part on four mitigating factors—absence of prior discipline under 9.32(a); absence of a dishonest or selfish motive under 9.32(b); cooperative attitude toward the proceedings under 9.32(e); and a strong reputation in the community under 9.32(g)—the referee concluded that a suspension was not warranted. (ROR: 55-6.)

While finding that Respondents "were no doubt motivated, *in part*, by a desire to receive a fee" and "close out" the difficult flight attendant cases, the referee concluded that their "prime motivation" was judicial oversight over FAMRI and obtaining monetary relief for their progeny clients. (ROR: 49.) And, in rejecting the Bar's argument that successfully modifying the original agreement could have prompted the original tobacco defendants to try and unravel the entire settlement, the referee concluded the Petition "could not have possibly caused any class member (other than Blissard and Young) financial or legal harm." (ROR: 53.) Based upon these findings, the referee rejected the Bar's request for a ninety-one day suspension from the practice of law and instead recommended that both Hunter and Gerson receive an admonishment for minor misconduct. (ROR: 56.)

## SUMMARY OF ARGUMENT

In *Young*, this Court stated that attorneys cannot avoid the application of Rule 4-1.7 "by taking on representation in which a conflict of interest already exists and then convert a current client into a former client by withdrawing from the client's case*." Young*, 136 So. 3d at 582 (citing *Clements*, 2006 WL 2252541, at *2 (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")). The referee erroneously relies on this "hot potato" doctrine for the conclusion that those clients who objected to the Petition against FAMRI "were either 'current' clients or not 'clients' at all" and, therefore, Rule 4-1.9 was inapplicable to these proceedings. (ROR: 36.) This legal conclusion is clearly erroneous and misconstrues the findings in *Young*. More importantly, it ignores the competent and substantial record evidence demonstrating that Respondents' pursuit of the Petition was materially adverse to the interests of their former clients in violation of Rule 4-1.9.

Considering the ample record evidence establishing Respondents violations of both Rules 4-1.7 and 4-1.9, and the seriousness of their conduct, the referee's recommendation for an admonishment for minor misconduct is not supported by this Court's case law or Florida's Standards for Imposing Lawyer Sanctions. Given

the significance of the conflicts involved, the potential for harm, and Respondents' continued refusal acknowledge the wrongful nature of their conduct, a thirty-day suspension is the appropriate discipline.

## ARGUMENT

### I. THE REFEREE'S CLEARLY ERRONEOUS CONCLUSION THAT RULE 4-1.9 WAS INAPPLICABLE TO THESE PROCEEDINGS IGNORED THE COMPETENT AND SUBSTANTIAL EVIDENCE THAT RESPONDENTS' PURSUIT OF THE PETITION WAS MATERIALLY ADVERSE TO THE INTERESTS OF THEIR FORMER CLIENTS.

Despite the *Young* opinion's finding that Respondents violated both Rules 4-1.7 *and* 4-1.9, the referee determined that this Court's adoption of the "so called 'hot potato' doctrine"—which prohibits lawyers from choosing "to drop one client 'like a hot potato' in order to treat it as though it were a former client" to avoid conflicts with current clients—precluded an analysis under Rule 4-1.9. (ROR: 30, 35-36 (quoting *Young*, 136 So. 3d at 582, citing *Clements*, 2006 WL 2252541, at *2).) The referee correctly acknowledged 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.'" (ROR: 36) (quoting *Young*, *Id.*) But the referee erred in finding, as a corollary, that Hunter and Gerson's "current" clients could not be converted into "former" clients for purposes of Rule 4-1.9. (ROR: 36.)

In adopting a flawed binary test (either the objecting clients were "current" clients, or they were not "clients" at all), the referee concluded that despite Hunter and Gerson's withdrawal from their clients' cases, they could not be rendered "former clients" under Rule 4-1.9 (ROR: 36.) As a result, the only Rule Respondents could potentially violate was 4-1.7. (ROR: 36-37.) By following this mistaken logic, the referee ignored the ample record evidence demonstrating that Respondents' pursuit of the Petition against FAMRI was materially adverse to the interests of Blissard, Chambers, Waerness and Spurgeon in violation of Rule 4-1.9.

Ordinarily, a referee's findings of fact concerning guilt carry a presumption of correctness which should be upheld unless they are clearly erroneous or without support in the record. *The Florida Bar v. Vannier*, 498 So. 2d 896, 898 (Fla. 1986). If the referee's findings are supported by competent and substantial evidence, this Court is "precluded from reweighing the evidence and substituting [its] judgment for that of the referee." *The Florida Bar v. MacMillan*, 600 So. 2d 457, 459 (Fla. 1992). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996). However, this Court's scope of review for a referee's legal conclusion that a

respondent is not guilty is broader than it is for purely factual findings. *The Florida Bar v. St. Louis*, 967 So. 2d 108, 120 (Fla. 2007) (referee's legal determination that attorney was not guilty violating Rule 4-1.7 was subject to broader scope of review than factual findings).

In the instant case, the referee's legal determination that Respondents could not be guilty of violating both 4-1.7 and 4-1.9 runs contrary to this Court's longstanding disciplinary jurisprudence. For example, in *The Florida Bar v. Dunagan*, an attorney was found guilty of violating Rule 4-1.7 and 4-1.9 for representing a husband and wife in several business transactions, and later filing a petition for dissolution of marriage on behalf of the husband against the wife. 731 So. 2d 1237 (Fla. 1999). Similarly, in *The Florida Bar v. Scott*, an attorney was guilty of violating Rule 4-1.7 and 4-1.9 for representing multiple clients "either seriatim or in conjunction," who all had claims to the same limited funds in the attorney's trust account. 39 So. 3d. 309, 316 (Fla. 2010). And in *The Florida Bar v. Marke*, an attorney was found guilty of violating 4-1.7 and 4-1.9 for representing a husband and wife in the sale of their business to another company, and later representing the new owners against the husband and wife. 669 So. 2d 247 (Fla. 1996).

In constructing a false dilemma (that Respondent's clients were current clients or not clients at all), the referee reached a conclusion neither warranted nor suggested by this Court in *Young.* The opinion approvingly quotes *Clements* and *Unified Sewerage Agency of Washington County, Or. v. Jelco Inc.* for the notion that the duty of client loyalty under Rule 4-1.7 prohibits an attorney from selectively "choosing when to cease to represent [a] disfavored client." 646 F. 2d 1339, 1345 n. 4 (9th Cir. 1981). But the logic behind these authorities—that an attorney cannot avoid a conflict with a current client by converting that client into a former one—does not preclude the application of Rule 4-1.9 to Respondents' conduct. In the instant case, the ongoing act by Respondents (planning, filing and prosecuting the Petition against FAMRI) violated Rule 4-1.7 as to certain current clients at one point in time, and after withdrawing and converting those clients into former ones, violated Rule 4-1.9 at a later point.

Because of this erroneous conclusion, the referee overlooked the competent and substantial evidence demonstrating Respondents' guilt. Under Rule 4-1.9, a lawyer who has formerly represented a client in a matter is prohibited from "represent[ing] another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client gives informed consent." R. Regulating Fla. Bar 4-1.9(a).

To establish a violation of this Rule, the evidence must prove (1) the existence of a lawyer-client relationship; and (2) that the matter in which the lawyer or law firm represents an interest adverse to the former client is "the same or substantially related to the matter in which it represented the former client." *State Farm Mut. Auto Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991).

The record evidence clearly establishes the first prong of this analysis. There can be no dispute that Hunter and Gerson represented Blissard, Chambers, Waerness and Spurgeon in their progeny actions. In addition, the record plainly demonstrates that Respondents converted these current clients into former clients upon receiving notice of their objections to the Petition. After receiving Blissard's correspondence, Hunter immediately filed his motion to withdraw and obtained an order granting it on June 24, 2010. (TR III: 309; TE 74.) Similarly, after receiving Chambers' objection to the Petition (which Hunter had filed without her written consent), he obtained an order granting his motion to withdraw in May of 2011. (TR III: 332-33; TE 75.) Gerson, upon learning of Waerness' objection, moved to withdraw on May 28, 2010, and eventually secured an order granting his motion on June 21, 2011. (TR I: 108-09; TE 16; TE 73.) Finally, despite sending Spurgeon a letter offering to withdraw from her case after she objected, Gerson had already

allowed her to be converted into a former client as a result of her case's dismissal for lack of prosecution in 2008. (TE 14; TE: 6; TE: 72.)

As for the second prong, "[m]atters are 'substantially related' for purposes of rule 4-1.9 if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work the lawyer performed for the former client." Comment to R. Regulating Fla. Bar 4-1.9 A determination of whether matters are substantially related depends upon the "specific facts of each particular situation or transaction." *Dunagan*, 731 So. 2d at 1240. If a lawyer has been directly involved in a specific transaction, "subsequent representation of other clients with materially adverse interests is clearly prohibited." Comment to R. Regulating Fla. Bar 4-1.9.

The specific facts of this case clearly demonstrate that the Petition was substantially related to the *Broin* settlement and the individual progeny actions. For starters, the original settlement, for which class members had bargained and provided consideration, established FAMRI, dictated its manner of funding and operation, and provided for the individual compensatory suits with their associated procedural benefits. Hunter and Gerson's clients accepted these benefits by pursuing their progeny actions, while also enjoying the less tangible benefits of FAMRI's research activities. The Petition brought by Respondents sought to

modify the original agreement and provide flight attendants with compensation directly from FAMRI, instead of through the successful prosecution of progeny suits. This substantial relation was not lost on this Court, which noted in *Young*:

> "[T]he original class action resulted in the underlying settlement agreement that established FAMRI, set limitations on the use of FAMRI's funds (which the current petition seeks to distribute), and contemplated the individual progeny suits by the flight attendants against the tobacco companies."
>
> *Young* at 583.

The substantial relation between the Petition and the progeny actions is further evidenced by Respondents' own words. In Gerson's "status" letters to his clients, he opened by stating that he and the other plaintiffs' lawyers "have reached consensus for the best way bring this litigation to a successful conclusion and finally provide you with monetary compensation we believe you deserve." (A2.) Hunter's letters, using nearly identical language, began by stating that "I, along with a group of attorneys who are also representing flight attendants, have been meeting regularly over the last 12 months analyzing and discussing strategies and options." (A3.) He continued, noting that, "[a]fter in depth analysis, we have a consensus on the best avenue to bring this litigation to a successful conclusion and finally provide you with monetary compensation." (A3.) Finally, in Alvarez's follow-up email to Stanley Rosenblatt, he articulated the team's understanding that they were seeking "closure for the Flight Attendant Litigation." (TE 7.)

The method of achieving "closure" and reaching a "conclusion" was to modify the original settlement and seek the disbursement of FAMRI's funds directly to individual flight attendants. This supports the conclusion, rightly reached in the trial court's order of disqualification and this Court's opinion in *Young*, that "the individual litigation and the action against FAMRI are substantially related as that term is defined in Rule 4-1.9." *Young* at 583. By attempting to redirect the funds FAMRI had been granted in the original settlement agreement, Respondent's believed they had finally discovered a way of closing out the individual flight attendant cases. But by choosing to pursue the Petition on behalf of some of their clients, adverse to the interests of Blissard, Chambers, Waerness and Spurgeon in a substantially related matter, Respondents violated Rule 4-1.9. Owing to the competent and substantial evidence establishing these facts, which the referee's erroneous legal conclusion ignored, this Court should find Respondents guilty of violating Rule 4-1.9.

## II. THE REFEREE'S RECOMMENDED SANCTION OF AN ADMONISHMENT FOR MINOR MISONDUCT HAS NO REASONABLE BASIS IN EXISTING CASE LAW OR THE STANDARDS FOR IMPOSING LAWYER SANCTIONS, AND SHOULD BE REJECTED BY THIS COURT IN FAVOR OF A THIRTY-DAY SUSPENSION.

This Court's scope of review over disciplinary recommendations is broad, as it bears the ultimate responsibility of imposing the appropriate sanction. *The*

*Florida Bar v. Adorno,* 60 So. 3d 1016, 1030-31 (Fla. 2011) (citing *The Florida Bar v. Anderson,* 538 So. 2d 852, 854 (Fla. 1989); Art. V. § 15, Fla. Const.) Generally speaking, this Court will not second guess a referee's recommended discipline so long as it has a reasonable basis in the existing case law and Florida's Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Temmer*, 753 So. 2d 555, 558 (Fla. 1999).

Although the referee characterized Respondents' misconduct as a "one-time transgression," and the case itself as a "proverbial black swan and outlier," his recommendation of an admonishment for minor misconduct is unsupported by the existing case law, and has no reasonable basis the in the Standards. Rather, the appropriate sanction for Respondents' blatant conflicts of interest is a thirty-day suspension.

**Florida's Standards for Imposing Lawyer Sanctions**

The referee's recommended sanction of an admonishment is without support in Florida's Standards for Imposing Lawyer Sanctions. Standard 4.34 allows for an admonishment when the lawyer is "negligent" in determining that the representation "will adversely affect another client, and causes little or no injury or potential injury to a client." However, the extensive record evidence makes clear that the conflicts facings Respondents were unmistakable and raised the specter of

substantial harm. Consequently, the appropriate Standard for consideration is 4.32, which requires a suspension.

Standard 4.32 states: "Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." The Standards define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." "Potential injury" is defined as "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably had resulted from the lawyer's misconduct."

The Petition filed by Respondents attacked FAMRI and its board, and sought to redirect *all* of its remaining funds to a subset of the original *Broin* class. The conflicts this posed were obvious, and but for Respondents' disqualification—which they vigorously opposed—the relief sought by the Petition could have caused serious potential injury.

Consider Hunter's conflict with Blissard. The referee properly recognized that the Petition was clearly and directly adverse to the interests of FAMRI and its board members, including Blissard. (ROR: 37-8.) In blaming FAMRI's entire

board of misusing funds, it plainly accused Blissard—a board member—of the same misconduct. Notwithstanding this obvious conflict, the referee concluded that, prior to *Young*, the Comment to Rule 4-1.7 "seemed to support" Hunter's attempt to resolve the conflict by withdrawing from Blissard's case. (ROR: 51.) However, the Comment itself provides for an attorney's withdrawal only "[i]f such conflict arises *after* representation has been undertaken …" Comment to R. Regulating Fla. Bar 4-1.7 (emphasis added). When, as in the instant case, the conflict exists "before representation is undertaken" (i.e., before the Petition was filed), "the representation should be declined." *Id*. Hunter had knowledge of his conflict with Blissard for at least seven months before he filed the Petition, and the Comment makes clear that the proper course of action was to decline to pursue any action against FAMRI. This was far from "debatable" or "unsettled" prior to *Young*.

For both Hunter and Gerson, the potential harm in pursuing the Petition over the objections of Chambers, Waerness and Spurgeon was just as clear and just as adverse. First, had FAMRI been stripped of its corpus, its funding into research seeking the diagnosis, treatment and cure of diseases suffered by flights attendants caused by second-hand smoke exposure would have ground to a halt. These clients valued and benefited from this work, and they expressly conveyed their request

that Respondents leave FAMRI's funds undisturbed. Instead, Respondents did exactly the opposite.

Second, had the Petition been successful, it ran the risk of undoing the very settlement responsible for providing class members with *any* benefits, FAMRI-related or otherwise. As this Court recognized, "[t]he settlement agreement provided that if the settlement is modified in any way by the court 'then this [s]ettlement [a]greement shall be canceled and terminated, and shall become null and void, and the parties shall be restored to their original position." *Young* at 577. Since the trial court and the Third District approved of the settlement without modification, the Petition's attempt to redirect FAMRI's remaining funds to certain class members marked a substantial modification. *See Philip Morris Inc. v. French*, 897 So. 2d 480, 482-83 (Fla. 3d DCA 2004) (noting that the trial court approved the settlement "without modification" and that the Third District affirmed the trial court's order in the *Ramos* opinion). Indeed, Philip Morris's own statement reflected its view that "the Petition proposes a modification of that material term." (TE 29: 1-2.)

If Respondents were successful, and the original tobacco defendants claimed a violation of the settlement agreement, a potential result could have been the complete unraveling of the settlement: the return of FAMRI's funds and the loss of

the procedural and substantive benefits in the progeny cases. Thus, aside from FAMRI's dissolution and the loss of any compensation, Respondents' former clients could have faced the reintroduction of the statute of limitation defenses and heightened burdens of proof in their progeny actions. This is in stark contrast to the referee's finding that the Petition, if successful "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." (ROR: 53.) The record evidence makes clear that the potential harm facing Chambers, Waerness and Spurgeon was not, as the referee suggests, "remote and speculative at best." (ROR: 53.)

Further, the commentary to Standard 4.32 states that suspension is appropriate "when a lawyer knows or *should know* that the interests of a client are materially adverse to the interests of a former client in a substantially related matter, and causes injury or potential injury to the former or the subsequent client." (emphasis added). Even if there were a colorable claim that Respondents lacked actual knowledge of the nature of their conflicts—which there isn't—they plainly should have known of the risk the Petition posed to the interests of their clients, whether current ones who supported the Petition, or former ones who had objected. As this Court stated in *The Florida Bar v. Scott,* "an attorney engages in unethical

conduct … when he knows or should know of a conflict of interest prohibiting the representation." 39 So. 3d 309, 316 (Fla. 2010). Given the potential injury that could have resulted, and the strident objections of Blissard, Chambers, Waerness and Spurgeon, Respondents should have known that the interests of their former clients were materially adverse to those flight attendants who supported the Petition. Consequently, under any scenario contemplated by Standard 4.32, a suspension is warranted.

Turning to mitigation and aggravation, the referee found that aggravating factors 9.22(g) (refusal to acknowledge wrongful nature of conduct) and 9.22(i) (substantial experience in the practice of law) applied. (ROR: 54.) In mitigation, the referee found four factors applicable: 9.32(a) (absence of a prior disciplinary record); 9.32(b) (absence of a dishonest or selfish motive); 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings); and 9.32(g) (character or reputation). (ROR: 54-5.)

Given the circumstances of this case, factor 9.22(g) is especially deserving of consideration. Nearly six years after the trial court first found Respondents possessed disqualifying conflicts of interest under Rules 4-1.7 and 4-1.9, and three years after this Court agreed, Respondents still insist that the Petition did not seek relief adverse to their objecting clients. In fact, at no time have Respondent's

acknowledged any wrongdoing in this matter. To the contrary, at the discipline hearing Gerson insisted that "there was nothing that we were doing that was adverse to [Waerness's] interest in any way." (TR I: 106.) In fact, Gerson tried to shift blame by claiming it was all just a "strategy by the Rosenblatts to recruit a client and convince her to object to what I was doing …" (TR I: 109.) Similarly, with respect to Blissard, Hunter testified that he could not "see anything that we would be pursuing here [that] could possibly be in conflict with anything we've represented her for, or would give rise to anything that I could perceive to be a conflict." (TR III: 327). So intoxicated by the righteousness of the Petition were Respondents that, to this day, they cannot bring themselves to acknowledge any misconduct.

**Applicable Case Law Regarding Discipline**

A thirty-day suspension is the appropriate discipline under this Court's case law. Contrary to referee's conclusion that that the instant case does not resemble any of the cases cited by the Bar involving "egregious" misconduct, the facts dictate otherwise. And, although the Bar no longer seeks a ninety-one day suspension for Respondents' misconduct, the referee's recommendation of an admonishment is far too lenient under this Court's precedent.

For instance, although one fair reading of the Petition suggested it was being brought on behalf of the entire class, Respondents were only seeking relief for several hundred clients. Indeed, at the time of the motion to disqualify, Respondents' counsel advised the trial court they only had authority to proceed on behalf of 400 flight attendants. (ROR: 29; TE 32: 48.) As a result, had the Petition been successful, the remaining tens of thousands of class members who had not pursued progeny cases, as well as Respondents' clients who had not consented to the Petition, would have been excluded from any compensation.

This conduct is comparable to the scenario presented in *The Florida Bar v. Adorno*, where the attorney violated Rule 4-1.7(a)(1) by negotiating the settlement of a purported class action on behalf of a select few members to the exclusion of the remainder of the putative class. 60 So. 3d 1016, 1028 (Fla. 2011). Respondents, in seeking to disburse FAMRI's remaining funds to a portion of the 3,000 *Broin* progeny flight attendants (which is in turn only fraction of the total class), over the objection of other clients, while taking a 30% fee for themselves, placed their and their favored clients' interests ahead of Blissard, Chambers, Spurgeon and Waerness. Just as Adorno "focused on the interests of the named plaintiffs … and abandon[ed] the putative class in order to achieve the $7 million settlement," so

too did Hunter and Gerson seek to modify the class action settlement to benefit a subset of their clients, who constituted only a fraction of the *Broin* class. *Id.*

While Respondents' conduct is not *as* egregious as that in *Adorno,* this Court routinely imposes suspensions for misconduct involving conflicts of interest. *See e.g.*, *The Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010) (three-year suspension for attorney who represented clients with unwaivable conflicts of interest and made material misrepresentations to clients); *The Florida Bar v. Wilson*, 714 So. 2d 381 (Fla. 1998) (one year suspension for representing a wife in dissolution proceedings after attorney had previously represented both husband and wife in declaratory action allocating lottery winnings between them); *The Florida Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009) (eighteen-month suspension for attorney who represented an aircraft parts and leasing company, and then proceeded to establish his own aircraft leasing company which competed directly against his client); *The Florida Bar v. Dunagan*, 731 So. 2d 1237 (Fla. 1999) (ninety-one day suspension for attorney who represented husband in dissolution proceeding after he had represented both husband and wife in business matters and used information from prior representation to the detriment of the wife).

Although this Court imposed lengthy suspensions in the above cases, there are important differences justifying a shorter suspension for Respondents'

misconduct. Unlike *Adorno* and *Scott*, there are no findings that Respondents engaged in dishonesty, fraud, deceit or misrepresentation in violation of Rule 4-8.4(c). Similarly, unlike *Wilson*, there are no findings that Respondents engaged in conduct prejudicial to the administration of justice contrary to Rule 4-8.4(d). Further, unlike the attorney in *Dunagan*, who had previously been disciplined twice for misconduct involving conflicts of interest, Respondents have no formal disciplinary history. Finally, as the referee found, there is no evidence in the record establishing that either Hunter or Gerson actually used any confidential information disclosed by their progeny clients in the preparation or prosecution of the Petition. (ROR: 54).

Considering these distinctions, the case that most closely fits the mark for the purposes of sanctions is *The Florida Bar v Marke*, 699 So. 2d 247 (Fla. 1996). In *Marke*, the attorney had represented a husband and wife in the formation of their travel business, followed by a number of unrelated matters over a fourteen-year period. *Id*. at 248. When the couple decided to sell their business, the attorney drafted agreements on their behalf allowing them to continue as employees under the new owner. *Id*. When problems arose between the couple and the new owner, Marke refused to provide any assistance. *Id*. Instead, he took the owner's side and opposed the couple over the terms of the very sales and employment agreements he

drafted on their behalf, representing the new owners on unemployment claims and other disputes concerning the couple. *Id*. at 249. Over Marke's request for a public reprimand, this Court found that a thirty-day suspension was appropriate for his violation of Rules 4-1.7 and 4-1.9. *Id*.

In light of the Standards, this Court's case law, and the extensive record evidence demonstrating the blatant and potentially damaging nature of Respondents' conflicts, the referee's recommendation of an admonishment for minor misconduct is "clearly off the mark." *The Florida Bar v. Vining*, 707 So. 2d 670, 673 (Fla. 1998). A thirty-day suspension is a much more appropriate sanction for Respondents' violations of Rules 4-1.7 and 4-1.9.

## CONCLUSION

In consideration of this Court's broad discretion as to discipline, and based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court reject the referee's recommendation that Respondents be found not guilty of Rule 4-1.9 and, instead, make a finding of guilt. Further, The Florida Bar respectfully requests that this Court reject the referee's recommendation of an admonishment for minor misconduct, and impose a thirty-day suspension as the appropriate discipline.

Thomas Allen Kroeger, Bar Counsel

## CERTIFICATE OF SERVICE

I certify that this Initial Brief 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 and that a copy has been provided via email using the E-filing Portal to John A. Weiss, Respondent Steven Hunter's Counsel at jweiss@rumberger.com; to Steven Kent Hunter, Co-Counsel, at shunter@hunterlynchlaw.com; to David Pollack and Farah R. Bridges, Counsel for Respondent Philip M. Gerson, at dpollack@stearnsweaver.com and frajani@stearnsweaver.com; and to Adria E. Quintela, Staff Counsel, The Florida Bar at aquintel@flabar.org on this 1st day of May, 2017.

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## CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this initial brief has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this initial brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Thomas Allen Kroeger, Bar Counsel

## INDEX TO APPENDIX