IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. SC16-1006 and SC16-1009

THE FLORIDA BAR,

Complainant,

v.

STEVEN KENT HUNTER and PHILIP MAURICE GERSON,

Respondents.

RESPONDENT STEVEN KENT HUNTER'S ANSWER BRIEF

On Review from the Report of Referee Hon. Michael A. Hanzman

Christopher J. Lynch, Esq.
FBN: 331041
Hunter & Lynch
6915 Red Road, Suite 208
Coral Gables, Florida 33143
Telephone: (305) 443-6200
shunter@hunterlynchlaw.com
lmartinez@hunterlynchlaw.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS[1]

The *Broin* flight attendant class-action suit filed against the tobacco industry resulted in a Settlement Agreement and Judgment affirmed in *Ramos v Philip Morris Inc*. 743 So.2d 24 (Fla. 3rd DCA 1999). As the Referee noted, the trial court retained jurisdiction over the Settlement funds.[2] ROR:10, n.8. These disciplinary proceedings arise from an order disqualifying attorneys Philip Gerson, Steven K. Hunter, Alex Alvarez, Philip Friedin, Hector Lombana, Ramon Abadin and H.T. Smith, related to a Petition in the *Broin* action to enforce the Mandate of the Third District Court of Appeal in *Ramos*.

In general terms, the Settlement provided for the establishment of a medical foundation (FAMRI) and would allow Class Members to pursue their individual personal injury suits so called *Broin* Progeny Cases.[3] Over 3000 lawsuits, ("Progeny Cases"), were subsequently filed in Miami-Dade County Florida. Over the next decade the suits, with one exception, resulted in defense verdicts. The tobacco

---

[1]As indicated herein, the Respondent Hunter requests that the Court approve the Referee's Report in all respects. Accordingly, Hunter withdraws his Cross-Notice For Review.

[2]In this Response we adopt all of the abbreviations that the Florida Bar used in its Brief and which are listed on page 1 of its Brief.

[3]At the *Broin* fairness hearing before the trial court, Class Counsel Stanley Rosenblatt made clear that "[w]e wanted the $300,000,000 to go to 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. ROR: 13, n.11.

defendants (hereinafter "Tobacco") began to seek and collect costs against losing plaintiffs. (TR: 70-80, ROR: 12).

One of the attorneys handling 500 such cases, although never having tried one, formulated an idea to allow direct distributions from FAMRI to injured flight attendants. This idea, and all of the developments that ensued from it, did not include dismantling the Foundation. (TE:24, TR: 173, 210, 279, 285). Extensive numbers of *Broin* flight attendant Class Members, who were beneficiaries of the Settlement, had voiced objections that the Settlement, which did involve the payment of a large sum of money from Tobacco, essentially provided them no real benefit. (TR: 57).

Respondent Hunter, one of the attorneys handling cases, was approached by attorneys Miles McGrane and Gary Paige who proposed a mechanism for direct payments to Class Members. (TR: 279).[4] As indicated in n.2 herein, the concept of payments directly to the flight attendants had always been the goal of the litigation, but when the Settlement was reached, Tobacco had never paid any money either by settlement or by judgment to any plaintiff. Hence, as Class Counsel Stanley Rosenblatt indicated, it couldn't be accomplished for the flight attendants in 1997.

[4]At that time Hunter was representing 330 Class Members who had filed *Broin* Progeny Cases. (TR: 272).

In light of this history, Respondent Hunter was skeptical that a mechanism could be found to allow direct payments to individuals. (TR: 279). First, Tobacco would object in that the Foundation was created only because of their insistence, and second, the *Broin* trial court, having retained jurisdiction over the Settlement, would have to agree. (TR: 279; TE: 57).

The several firms handling the Progeny Cases began a series of meetings and McGrane began to draft a Petition. Ultimately, Respondent Hunter was asked to discuss the issue with attorney Rosenblatt. (TR: 245-247; 285-289). His suggestion was that Rosenblatt, who was still Class Counsel (the Class had never been decertified and Class Counsel never discharged), present the matter to the presiding judge.

As Hunter testified at the first Grievance Committee Hearing:

> So I beg[an] a dialogue with Mr. Rosenblatt because he had always believed the same thing that I believed. He said that he had always believed, in 1997, that the money should go to the flight attendants. And Tobacco at that time was absolutely resistant to that. They [had] never paid a dollar, not a single dollar to anyone in 1996 or 1997 or 1998. So they [Tobacco] wanted to put this money into a fund so that it wouldn't go to anybody, any particular plaintiff.
>
> But we - - after - - the client's kept saying "Where did the money go?" And I didn't know where it went because I didn't have anything to do with that. I was suing [T]obacco

> and they're a handful.
>
> So in response to the client's, I began a dialogue with Mr. and Mrs. Rosenblatt and I said: "You always wanted this money to go to the flight attendants and let's see if we can do that."
>
> And we talked to [T]obacco and [T]obacco didn't have that attitude that they had 10 years before. So we thought - - we even retained trust lawyers to find out can we - can we, if it's legal get this money, some of it, into the hands of the flight attendants.
>
> And when we started out negotiating the case, [the Petition], it was amicable, it was not adversarial. Because the thinking had always been - - if we could - - but for [T]obacco, if we could, this money should go to the flight attendants.

(TE: 57).

While Stanley Rosenblatt would not agree to present the matter to the *Broin* court as Class Counsel, he did not object to this concept as it had always been the desire of everyone to compensate the flight attendants monetarily. A long series of meetings ensued which, as stated above, were **not** adversarial, although there was never an agreement on how **much** money would be sought for the flight attendants. Further, the idea or concept that the Foundation would be dismantled or even materially affected was never discussed. (TR: 310, 313).

A mediation was scheduled and at that mediation Respondent was, for the first time, advised that his client Blissard objected to the concept. (TR: 305). This was

not anticipated by Respondent because, until that point, he had believed he was trying to obtain for the flight attendants something that everyone had always desired, but had not been realized due to Tobacco's objection.

Respondent and McGrane, who was also advised by his client Young, that she objected to any attempts to obtain financial benefits for the flight attendants, discussed the matter, as Blissard's and Young's objections were a surprise to both.[5] (TR: 306). Following those discussions, both attorneys agreed that it was necessary to withdraw under the Bar Rules and Respondent did so. (TR: 306).

In addition to the aforementioned facts, Respondent accepts the section of The Florida Bar's Brief "**Attempts to Obtain FAMRI Funds**" as essentially correct. However, The Bar's quote to A.3 on page 12 of its brief is critically misleading in that Hunter's letter to his clients actually provides:

> The Court may possibly allow **some** money to be disbursed to individual flight attendants and we have filed a petition seeking this relief (emphasis supplied).

(A: 3).

The Petition was ultimately filed within the existing class action, *Broin v. Philip Morris Inc. et al*., case number 91-49738 CA 22. All Tobacco Defendants

[5]Of Hunter's 330 clients only two, Blissard and Chambers, objected to this course of action.

were noticed.

Six months after the Petition was filed, Former Class Representatives[6] Blissard and Young filed a motion to disqualify attorneys Philip Gerson, Steven K. Hunter and Alex Alvarez as having direct conflicts of interest, and attorneys Philip Friedin, Hector Lombana, Ramon Abadin and H.T. Smith, as having imputed conflicts of interest. (TE: 19).

During the Bar proceedings, Alvarez testified that following the filing of the disqualification motion, he consulted with an appellate lawyer, Robert Glazier, Esq., (TR: 238); Gerson conferred with his partner Ed Schwartz, also an appellate attorney, (TR: 104-06); and Respondent Hunter conferred with the undersigned. (TR: 336-37). Alvarez testified that the seven firms next retained former Judge Israel Reyes "We hired somebody who knew about disqualifications who had ruled on disqualifications before." (TR: 237). Further, the trial court's later granting of the disqualification motion was unanticipated by the seven firms and their counsel, (TR: 245), since all were of the measured opinion that the Progeny Cases and the Petition were not "substantially related matters" within the meaning of Rule 4-1.9 of the Rules Regulating The Florida Bar.

---

[6]Blissard and Young identified themselves as "Former Class Representatives" although the Class was never decertified and Class Counsel had not been discharged. (TE: 19).

This Court is well aware of the Third District Court of Appeal's analysis and reversal of the trial court's order so the court's analysis will not be restated here, other than to note that the Third District also concluded that the Petition was not "substantially related," to the Progeny Cases. See *Broin v. Philip Morris Companies Inc.*, 84 So.3d 1107, 1110 (Fla. 3rd DCA 2012). Further, as the Referee noted in addressing the Third District's ruling:

> 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.[7]
>
> 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

[7]On May 27, 2015, following the *Young v. Achenbauch*, 136 So.3d 575 (Fla. 2014) decision, the Eleventh Judicial Circuit Grievance Committee found no probable cause for disciplinary proceedings. The Committee also reached the same conclusion after being asked by the Board of Governor's Designated Reviewer to reconsider. (TR: 68). Also, two years *before* this Court's ruling in *Young*, the aforementioned facts were considered by the Florida Bar's investigating member for the Seventeenth Judicial Circuit Grievance Committee (F) and a finding of "no probable cause" was issued to the Respondent Hunter. (March 15, 2012).

> discipline an attorney for a violation of a claimed principle that was and is so highly debatable").

(ROR: 53-54).

In approving the so-called balancing test which has been applied in class action litigation, the Third District Court of Appeal cited *In re Agent Orange Prod Liab. Litig*., 800 F.2d 14 (2nd Cir. 1986), which has been widely followed. In that case, the Second Circuit indicated that:

> Automatic application of the traditional principles governing disqualification of attorneys on grounds of conflict of interest would seemingly dictate that whenever a rift arises in the class, with one branch favoring a settlement or a course of action that another branch resists, the attorney who has represented the class should withdraw entirely and take no position. Were he to take a position, either favoring or opposing the proposed course of action, he would be opposing the interests of some of his former clients in the very matter he has represented them. . . . . When an action has continued over the course of many years the prospect of having those most familiar with its course and status be automatically disqualified whenever class members have conflicting interests would substantially diminish the efficacy of class actions as a method of dispute resolution.

Id. at 18 - 19.

Applying this reasoning, the Second Circuit denied a motion for disqualification directed to two law firms representing numerous class members. In doing so, the court emphasized disqualification would deprive thousands of class

members of representation at a point 8 years in the litigation even though disqualification was not necessary to preserve the integrity of the judicial process. *Id*. at 18-20.

Finally, pages 21-27 of the Bar's Brief is a general paraphrasing of the Referee's Report. The Report is a well reasoned thorough analysis which speaks for itself and which this Respondent adopts. Accordingly, this Respondent will not restate the Report's extensive findings here.

Thus, Respondent asks this Court to accept the Report of the Referee and to approve the discipline recommended. Further, Respondent adopts Co-Respondent Gerson's argument as to rule 4–1.9 as set forth in ¶1 pg. 25 of Gerson's Answer Brief.

Respondent reasonably believed that his actions in attempting to put forward a mechanism allowing the presiding judge to make direct distributions to individual flight attendants was in furtherance of the desire of everyone involved in this litigation from its inception. The conflict did not result in any harm to Blissard, and she was represented by additional skilled and competent counsel.

As the Referee recognized, this was a complex highly unusual hybrid type of case, and the issues of conflict were fairly debatable, prior to this Court's opinion in *Young*. This was further demonstrated by the fact that a unanimous panel of the intermediate appellate court agreed with Respondent's position and reversed the

disqualification order based on the the considerable weight of authority addressing similar factual situations in the context of class actions. Finally, two grievance committees also found no probable cause for discipline and that no confidential information was disclosed.

SUMMARY OF THE ARGUMENT

As stated above, Respondent adopts Co-Respondent Gerson's position as to Rule 4-1.9 and as stated in paragraph 1, page 25 of Gerson's Answer Brief. As such, this Respondent also suggests that the Referee's finding as to the inapplicability of Rule 4-1.9 should be approved.

Further, Respondent accepts and supports the reasoning of the Referee at ROR:51, to wit: "Hunter. . . believed that he had a right to withdraw from her [Blissard's] representation, 'convert' her to a former client and argue that he should not be disqualified because the Petition was not 'substantially related' to the 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."

Because the Petition was filed within the *Broin* class action, the only relief available thereunder was subject to the reasonable discretion of the presiding trial judge, Gerald Bagley, who as a fiduciary to class members, was charged with the responsibility to enter only those orders which would be in the best interest of the class. Accordingly, the Bar's interpretation of what relief was sought and what relief

was possible, including the destruction of FAMRI, is not supported by the evidence before the Referee and represents a fundamental misunderstanding of the nature of the class action procedure and the role of the presiding judge as a fiduciary, who maintained jurisdiction over the settlement funds and the Foundation. Very simply, there was little or no realistic possibility that the trial judge, subject to appellate scrutiny, would have entered orders adverse to the *Broin* Class.

This Respondent accordingly requests that the Court approve the Referee's findings and recommendations in all respects. The Referee has vast experience in the class action arena, his factual conclusions are supported by the Record and his analysis of the law is correct.

ARGUMENT

THE FINDINGS OF THE REFEREE SHOULD BE APPROVED IN ALL RESPECTS

This matter comes before the Court following a dispute between Parties who at all times were represented by competent counsel. The Record from the underlying matter shows that Respondent Hunter and attorneys Rosenblatt had long-standing relationships of professionalism and that the conflict asserted by Blissard, through her numerous lawyers, came after a long period of consideration and discussions aimed at attempting to resolve a very complicated matter involving many affected individuals.

The ultimate resolution of the Petition was addressed to, and subject to, the careful and reasonable discretion of the trial judge, the Honorable Judge Gerald Bagley. Although the conflict issue was not presented to the trial court until six months after the filing of the Petition, no action was ever taken on the Petition to that point. (TR: 318-20). Further, there is zero evidence in the Record that Respondent's former clients were harmed or damaged in any respect whatsoever.

The Report of the Referee is a thorough, considered analysis of the evidence presented at the hearing. Respondent therefore respectively submits that it should be accepted and approved by this Court. As such, Respondent's basic argument is

essentially set forth in the well-reasoned Report of the Referee.

Apart from the aforementioned, however, Respondent does feel compelled to comment on some of the inaccuracies in the Bar's arguments concerning the recommended sanction. The Respondent agrees with the Bar's statement of the law, that generally speaking, the Court should not second-guess the 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. Herman,* 8 So.3d 1100, 1107 (Fla. 2009) (citing *The Florida Bar v.Temmer*, 753 So. 2d 555 (Fla. 1999)).

The Bar argues that suspension is appropriate pursuant to §4.32 of the Standards, which 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."

Once the disqualification motion was filed, six other law firms, two appellate lawyers and a former judge reached the conclusion that under the existing state of the law in Florida, because the matters raised in the Progeny Cases and the Petition were "not substantially related," there was no conflict. This collective opinion was later affirmed by the Third District Court of Appeal, which as also noted above, recognized the unique nature of conflict issues presented in the context of class actions.

Further, there was full transparency between the aforementioned lawyers and Class Counsel, the Rosenblatts, in all dealings with respect to the Petition. Indeed it was for this reason - that the Respondents were at all times completely candid in their dealings and views regarding the Petition - that the objecting clients took the position that those views gave rise to the conflict.

This is a critical fact ignored by the Bar - that both Blissard and Chambers were fully advised on all issues relevant to the Petition and Blissard was represented by highly competent counsel, Roderick Petrey, Stanley and Susan Rosenblatt. Thus, the aggravating fact of non- disclosure as set forth in §4.32 is wholly absent from this Record.[8]

The Bar extensively argues that the Petition sought to redirect *all* (emphasis supplied by the Bar) of the remaining settlement funds to a substitute subset of the original *Broin* class. The testimony at the hearing overwhelmingly laid this argument to rest; ROR: 13-14; and additionally, the Bar's Appendix III shows that as he advised his clients, Respondent Hunter's intent was that the trial court, in its role as fiduciary, may award <u>some</u> of the money to individual flight attendants.

[8]The cases relied upon by the Bar in challenging the Referee's sanction, which are outlined in pgs. 42-46 of the Bar's Brief, are dramatically different and involve considerable deception on the part of the lawyers involved resulting in harm to the clients.

Next, the Bar argues that potential harm could have occurred, had FAMRI been "stripped of its corpus." In reality, this possibility never existed. It was never sought by Respondent; ROR: 13-46, and more importantly, it could not occur because the Petition was directed to the reasoned discretion of the presiding trial judge who, sitting in equity, was charged with a fiduciary responsibility, implied by law, to protect the class.

It is inconceivable, as suggested by the Bar, that the trial judge, guided by the fiduciary responsibilities of a presiding judge over a settlement class, would abuse that discretion to the detriment of the class. See *Reynolds v. Beneficial Nat. Bank*, 288 F.3d, 277, 279-80 (7th Cir. 2002); see also ROR:10: "the court as a fiduciary to absent class members was charged with overseeing the fund." Further, Tobacco had no right to void the Settlement by virtue of anything raised in the Petition because such a right was not reserved to them in the Settlement Agreement.

As is accurately described in Co-Respondent's brief on page 47, the Settlement Agreement merely contained a provision, common in class-action settlements, that if the Settlement was not in fact temporally approved by the trial court and affirmed on appeal, it was null and void. However, nothing in the Agreement gave Tobacco a right 13 years later to void the Settlement and, furthermore, as the Referee indicated, ROR:49 "Tobacco companies' lawyers had advised Respondents that their

clients no longer cared whether flight attendant class members received compensation from FAMRI. That testimony was uncontroverted." ROR: 49 n.16.

Accordingly, the Bar mistakenly argues that if the Settlement was modified it would become null and void. This argument, which has no legal basis, is simply wrong in the context of the Petition filed 13 years after the Settlement was signed. Respondent feels it incumbent to address this issue not only because it is inaccurate, but also because the misstatement permeates the Bar's Brief and: (1) the settlement language voiding the agreement is boilerplate language in class settlements temporal to the approval and appellate review mandated in a class settlement; and the language does not survive appellate review approving the Settlement; (2) the petition was to *enforce* the mandate (TE: 18); (3) as the Referee noted, ROR:11, in extensive footnote 9 - the issue that would have been decided had the Petition gone forward - paying flight attendants money and providing for medical treatment, would not afford Tobacco any rights since they raised the issue in 1999 by way of rehearing, were ruled against and failed to petition this court for review in *Ramos* (TR: 137); and finally (4) the uncontroverted evidence is that Tobacco had no interest in the distribution to flight attendants. (ROR: 49).

Finally, as the Referee also found:

> "The court finds significant the absence of any of 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 records searches… 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.

ROR: 54, (emphasis in original).

Addressing Florida's Standards for Imposing Lawyer Sanctions set forth in Section 9.2, the Referee concluded the Respondents were not "impelled by a dishonest or deceitful motivation." *Id.* Rather, as the evidence demonstrated, Respondent's driving motivation had always been to effectuate the original intention of Class Counsel Rosenblatt, as announced at the fairness hearing in 1998, to get some actual compensation directly to the flight attendants. As the Referee stated:

> [Respondents'] prime motivation was to serve judicial oversight of the Foundation and obtain some monetary relief for clients who:(a) had suffered illness 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.

ROR: 49.

Finally, applying Standard 9.32(e) the Referee found that respondent enjoyed a strong reputation in the community as testified by Senior United States District Judge James Lawrence King and former Florida Bar President Francisco Angones.

Mr. Angones testified that he had been partners with the Respondent for more than 27 years and continues to handle cases as co-counsel with Respondent Hunter. Angones recalled during his 40 years of professional relationship with the Respondent a particular case in which Hunter's representation of children resulted in a change of the law to protect child witnesses in court proceedings.[9]

The Honorable James Lawrence King testified in vivid detail concerning a case he presided over 35 years ago that he often uses when speaking to judges and lawyers as an example of professionalism.[10]

In conclusion Respondent would request that the Court accept the Report of the Referee and accept the recommendation of discipline set forth therein. Further the Respondent would assure the Court that the Referee's statement preceding his conclusion is taken to heart: "Referee is convinced that from this point forward they

---

[9]Francisco Angones - "from the case (Country Walk child abuse) procedures were established in order to take depositions of children." (TE: 76).

[10]James Lawrence King - "the handling of that was done extremely professional - and I think that you called me because I've told this story 10 or 15 years later when there were a bunch of lawyers there and old judges. . ." (TR: 383).

will be more – indeed far more – diligent in erring on the side of caution." ROR: 56. Respondent wants to assure this Court that the Referee's conviction is true and correct and will come to fruition and is and will indeed be the guiding light in this Respondent's future practice.

CONCLUSION

For the reasons set forth above the Respondent Hunter requests that the Court approve the Referee's findings in all respects.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

By: /s/Christopher J. Lynch
CHRISTOPHER J. LYNCH
FBN: 331041
6915 Red Road
Suite 208
Coral Gables, FL 33143
clynch@hunterlynchlaw.com (primary)
lmartinez@hunterlynchlaw.com (secondary)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of July, 2017, I filed a true and correct copy of the foregoing document with the Clerk of the Supreme Court of Florida through E-filing Portal and I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List.

By: /s/ Christopher J. Lynch
CHRISTOPHER J. LYNCH
FBN: 331041
6915 Red Road
Suite 208
Coral Gables, FL 33143
clynch@hunterlynchlaw.com

SERVICE LIST

Thomas Allen Kroeger
Bar Counsel
The Florida Bar
Miami Branch Office
444 Brickell Avenue, Suite M-100
Miami, FL 33131-2404
tkroeger@flabar.org
abowden@flabar.org

John A. Weiss, Esq.
John A. Weiss. P.A.
2910 Kerry Forest Pkwy, Suite D4#346
Tallahassee, FL 32309-6828
jack2johnaweisspa.com

Adria E. Quintela
The Florida Bar
Lakeshore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, FL 33323
aquintel@flabar.org

David C. Pollack, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, FL 33130
dpollack@stearnsweaver.com