IN THE SUPREME COURT OF FLORIDA

No. SC 94,738

BRIAN NEIMAN, individually, and
BRIAN NEIMAN, INC., a Florida Corporation,

Appellants/Respondents,

vs.

THE FLORIDA BAR,

Appellee/Petitioner

Appeal of the Referee's Report

AMENDED
INITIAL BRIEF OF THE APPELLANTS, BRIAN NEIMAN and BRIAN NEIMAN, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

CERTIFICATE OF COMPLIANCE

This brief complies with this Court's Administrative Order dated July 13, 1998. It is typed in proportionately spaced Times New Roman 14 point font.

STATEMENT OF THE CASE AND FACTS

In January 1999, The Florida Bar (hereinafter referred to as "the Bar") filed a multi-count Petition Against the Unlicensed Practice of Law (hereinafter referred to as "Petition") against the Appellants/Respondents, Brian Neiman and Brian Neiman, Inc., a Florida Corporation (hereinafter collectively referred as "Neiman"). The Petition sought to enjoin Neiman from the unlicensed and/or unauthorized practice of law (hereinafter referred to as "UPL"). (Report of the Referee, p. 3, hereinafter referred to as "Report, p. __"). Contemporaneous with the filing of the Petition, the Bar referred the allegations in its Petition, relating to "participating in settlement negotiations," to the Broward County State Attorney's Office for criminal prosecution. The Bar moved to abate this case during the pendency of the criminal prosecution. Neiman wanted a referee appointed, so he could invoke and/or avail himself of the civil rules of discovery, and begin preparing his defense. The Bar's motion to abate the proceeding was granted. The conduct alleged in Counts IV, V, VI, VII and XIII, relating to "participating in settlement negotiations" were charged as criminal offenses. On August 19, 1999, Neiman entered an Alford plea of nolo contendere to five misdemeanor counts of UPL, reserving his right to appeal his Motion to Dismiss. The Honorable Robert W. Lee placed Neiman on probation with special conditions relating to his employment as a paralegal. Judge Lee felt the issue of whether a paralegal may participate in settlement negotiations was one of great public importance, and certified it as such to the Fourth District Court of Appeal.

Contrary to the Report, Neiman and the State Attorney's Office did not negotiate the conditions of probation relating to restrictions on his employment as a paralegal. Judge Lee asked both sides to submit proposals regarding restrictions on his employment as a paralegal. Judge Lee made the final decision and drafted the final order as follows:

> You will not engage in future conduct which constitutes the unlicensed practice of law. **However, in particular you may participate in meetings, settlement negotiations, mediations, or telephone discussions as a paralegal so long as**: (A) your employing attorney, your employing attorney's associate, and/or employing attorney's co-counsel is present and supervising you: (B) your employing attorney affirmatively represents to his client, and to the opposing party that the employing attorney remains responsible for your conduct and (C) all parties present at any meeting or telephone conference are advised at the beginning of your involvement in the process of whatever situation or circumstance you are resolving that your participation is that of a paralegal. Additionally, when you deal with any parties, other than your own employing attorney, you may in participating in these discussions pass on offers or factual information if those offers and factual information have been approved in advance by your employing attorney. (emphasis added)

In the criminal proceeding, engaging in settlement negotiations was not declared *per se* the unlicensed practice of law. Neiman was allowed to continue participating in settlement negotiations, so long as everyone involved knew he was a paralegal, and so long as he is doing it under an attorney's supervision. Later, when Judge Lee "switched hats" to the Referee in this case, he reversed himself.

After the criminal case concluded at the trial level, on January 3, 2000, this Court and Neiman were notified that Judge Lee would now preside over the Bar's case against Neiman. On February 3, 2000, the Referee held a status conference. (Report p. 3). The rush to judgment was on. Even through the Bar had years to prepare its case by subpoenaing witnesses for ex parte depositions, Neiman's trial, over his objection, began eighty-two days after the first status conference, and after Neiman's affirmative defenses and witness lists were struck. (Report p. 3).

The Referee struck Counts VIIA, X, XI, XIV, XIX and XX. (Report, p. 21, 27,30, 39). The Referee found no violation as to Count XVI. (Report, p. 34). Therefore, these counts are not discussed herein.

The Petition alleged a "laundry list" of violations, and it asked for some sanctions that did not apply. The Bar's shotgun approach included conduct that the Bar did not allege Neiman had committed. For example, the Bar did not want him receiving legal fees from clients or other persons. In the cases set forth in the Petition, the clients were represented on a contingent fee basis, and any recoveries were paid by a check issued in the attorney's name and/or the client's name and deposited in the trust account of the attorney that employed him. Neiman could not sign checks drawn on the attorney's trust account.

The Petition sought a permanent injunction that prevented Neiman from: (1) engaging in UPL until such time as he was duly licensed as an attorney, (2) advertising to the public that he performs public legal services, legal advice or personal legal assistance, (3) advising persons of their rights, duties and responsibilities under the law, (4) advising persons of legal remedies that might be available to them, (5) representing to the public that he is capable of advising and handling matters requiring legal skill, (6) allowing the public to rely on his skills to properly prepare legal documents or legal forms, (7) holding himself out to be an attorney, (8) receiving directly or indirectly funds of any clients or persons regarding legal matters, (9) disbursing directly or indirectly funds of any clients or persons regarding legal matters, (10) receiving fees for legal matters, (11) handling in any manner funds of a client in a legal matter, (12) being a signatory on any bank account that receives or disburses funds concerning legal matters, and (13) engaging in any manner in UPL. (Petition). Before trial at a status conference, Neiman informed the Bar and the Referee that he had no objection to being enjoined from the above enumerated activities. While Neiman denied doing these acts, he acknowledges that these acts are prohibited

conduct by a paralegal, and he agrees not to engage in these acts. Therefore, these acts are not discussed herein.

The Petition also sought a permanent injunction that prevented Neiman from performing tasks that clearly a paralegal may perform under the guidance and supervision of an attorney.[1] Plus, the Petition sought a permanent injunction that prevented Neiman from performing tasks that do not constitute UPL, if performed under the guidance and supervision of an attorney.[2] Neiman would not agree to be enjoined from these activities, hence the case went to trial.

If the Report is affirmed, its practical effect is that Neiman is forever barred from working as a paralegal even under the guidance and supervision of an attorney. The recommended prohibitions that are the subject of this appeal are:

(1) having direct contact with any client of his supervising/employing attorney, or opposing counsel, or any third party involved in his employing attorney's client's legal matter,

(2) speaking at settlement conferences, meetings, negotiations, or mediating regarding his employing attorney's clients' claims, even with his employing/supervising attorney present,

(3) preparing pleadings, motions, or any other legal document for "others," which would include the attorney that employs him, and

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[1] The prohibited tasks included: (1) having any discussion whatsoever with any clients of his employing attorney about their legal matter, (2) having any discussion whatsoever with witnesses, opposing counsel, the opposing party or insurance companies about any legal matter of his employing attorney's clients, (3) participating in settlement conferences or mediation hearings pertaining to his employing attorney's clients, or (4) working as a law office manager for any attorney.

[2] The prohibited tasks included: (1) participating in negotiating the settlement of legal disputes, legal matters or lawsuits of his employing attorney's clients, or (2) participating in settlement conferences or mediation hearings pertaining to his employing attorney's clients.

(4) suggesting or participating in the accumulation of evidence in support of any legal claim, which would include action taken under the guidance and supervision of his supervising attorney. (Report, p. 54-55) (emphasis added)

The counts that dealt with the contested recommendations are:

Count I charged that when Neiman worked for attorney Norman Ganz that Neiman advised opposing counsel that Mr. Ganz was not available, and thereafter discussed settlement and other issues with them. No specific client's case or incident was alleged. Count I also dealt with Neiman's income; there was no proof, or opinion rendered by the Bar's auditor that Neiman engaged in impermissible fee splitting.[3] (Report p. 5-7).

Count II concerned a personal injury case wherein the claimant retained other counsel to complete the case; however, while Mr. Ganz was the claimant's attorney, Neiman had settlement discussions with the tortfeasor's representatives (i.e., an insurance adjuster) (i.e., in other words, Neiman, a non-lawyer, had settlement discussions with an insurance adjuster). (Report p. 7-8).

Count III charged that in a wrongful birth case that Neiman attended a mediation with his supervising attorney. The supervising attorney allowed Neiman, who was more familiar with the facts of the case, to present the facts, and thereafter actively participate in the negotiation process. (Report p. 8-9).

Counts IV, V and VI charged that Neiman engaged in settlement negotiations with opposing counsel. Neiman's employing attorney represented employees with discrimination claims against their employer, the Clerk of the Court of the Seventeenth Judicial Circuit. Neiman appeared at a settlement conference with the claimants'

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[3] The Bar could not dispute Neiman's testimony that his income was derived from two sources. First, he was paid $100 per hour for his paralegal work. Second, he provided luxury office space, office equipment, telephone, clerical help, etc for his employing attorney. He derived a profit from doing so.

attorney, and he participated in the settlement negotiations. Later, the claimants' attorney(s), not Neiman, settled the plaintiffs' claims. (Report p. 9-21).

Counts VIIB and VIII charged that in two discrimination cases that Neiman engaged in settlement negotiations on behalf of the claimants with opposing counsel. Neiman acknowledged that he relayed a series of offers and counteroffers. Accompanied by an associate attorney, Neiman attended a settlement meeting, and he participated in the settlement negotiations. However, the claims were not settled at that meeting. Later the claims were settled. (Report p. 21-24).

Count IX charged that in an employment discrimination case that Neiman engaged in settlement negotiations on behalf of the claimants. Neiman and three attorneys on behalf of the claimants attended a pre-suit settlement conference. Neiman participated in the settlement discussions, but the claims were not settled at that time. Later, an attorney employed by a separate and distinct law firm negotiated a settlement, and Neiman did not participate in those negotiations with opposing counsel. (Report p. 24-27).

Count XIII charged that in an employment discrimination case that Neiman engaged in settlement negotiations on behalf of the claimant. Neiman attended a mediation with the claimant's attorney, and he was allowed to participate in the settlement negotiations at the mediation; the claims were not settled. (Report p. 29-30)

Count XVII charged that in a defective automobile case, akin to a lemon law case, that Neiman participated in settlement negotiations. Neiman bought his significant other a car, and titled it in his significant other's name. During the case, the trial court determined that Neiman was the real party in interest. Thus, accepting the trial court's characterization of Neiman's position, the Bar charged Neiman with engaging in settlement negotiations pertaining to "his" own car. (Report p. 34-36)

Count XVIII charged that in an employment discrimination case that Neiman engaged in settlement negotiations on behalf of the claimant. Neiman attended a

settlement conference with his employing, who attorney deferred to him because Neiman was more familiar with the facts. He participated in the settlement conference, but the claim was not settled at that time. Later the case was resolved without Neiman's involvement. (Report p. 37-39).

Count XI charged that in a sexual harassment case that Neiman engaged in settlement negotiations on behalf of the claimant. The defrocked television news reporter charged with participating in rigging the gas tanks to explode on Ford pickup trucks for an investigative report, was charged with sexual harassment. Neiman attended a pre-suit settlement discussion with the claimant's attorney, and participated in the settlement discussions, but the claim was not settled. Later, the lawsuit was filed. It was settled by the claimant's attorney. (Report p. 39-42).

SUMMARY OF ARGUMENT

Neiman was charged with the unlicensed practice of law for "participating in settlement negotiations." Neiman participated in settlement discussions during in-person meetings between his employing attorney and opposing counsel, while attending mediations with his employing attorney, and during telephone conversations with insurance adjusters or opposing counsel. In all instances, Neiman did so at the direction of his employing attorney, and under the guidance and supervision of his employing attorney. Based on a 1991 article published by the Bar, Neiman believed that it was permissible for him to do so. The gist of the article was that a paralegal may relay offers and counteroffers to opposing counsel and insurance adjusters, and may also relay factual information to those same parties. Neiman operated under this credo until the Bar filed its Petition and got him charged with a crime.

By custom and practice, the rules of court, and the case law, "participating in settlement negotiations" is not the unlicensed practice of law, as evidenced by the fact that insurance adjusters routinely participate in settlement negotiations on behalf of

torfeasors. Besides this Court has approved lay persons, not supervised by an attorney, to participate in and even settle matters in small claims court.

Accordingly, the recommendation prohibiting a paralegal from "participating in settlement negotiations" should be modified. This Court should find that a paralegal may participate in meetings, settlement negotiations, mediations, or telephone discussions as a paralegal so long as: (1) his employing attorney, his employing attorney's associate, and/or the employing attorney's co-counsel is supervising him; (2) his employing attorney affirmatively represents to his client, and to the opposing party that the employing attorney remains responsible for the paralegal's conduct and (3) at the beginning of any meeting or telephone conference that all parties are advised of the paralegal's status. Additionally, when a paralegal has dealings with any parties, other than his own employing attorney, he may in participating in these discussions pass on offers or factual information, if those offers and factual information have been approved in advance by his employing attorney.

In its zeal to prosecute Neiman, the Bar has ignored the fact that non-lawyers representing tortfeasors routinely participate in settlement negotiations. Insurance companies and governmental agencies on behalf of their respective "clients" routinely use non-lawyers to negotiate with claimant's lawyers to settle legal disputes. The Bar has no intention of enjoining these activities, thereby creating an Equal Protection problem.

Lastly, the Bar convinced the Referee to issue an overbroad order that enjoins lawful activity. Where illegal conduct is separable from legal conduct within a legal business enterprise, the general rule is that only the illegal conduct may be enjoined. Therefore, Neiman should not be enjoined from performing legitimate tasks.

Point 1

"PARTICIPATING IN SETTLEMENT NEGOTIATIONS" IS NOT THE UNLICENSED PRACTICE OF LAW.

The Referee's Report recommends that Neiman be enjoined from prohibited conduct as well as lawful conduct. While this Court is obligated to enjoin Neiman from engaging in prohibited conduct, it is also obligated to see that the injunction is not overbroad. As a general rule, where illegal conduct is separable from legal conduct within a business enterprise, only the illegal conduct may be enjoined. *Health Clubs Inc. v. Cataldo*, 377 So.2d 28, 29 (Fla. 5th DCA 1979). In *The 4245 Corporation v. The City of Oakland Park*, 473 So.2d 12 (Fla. 4th DCA 1985), a business was totally enjoined from operating. Judge Anstead, in reversing the injunction, wrote:

> Clearly, there were some indecent acts constituting lewdness which justified an injunction. However, based on the record, the limited number of occurrences, and **the fact that no prior injunction had issued**, we are of the opinion that the finding "that said corporation could not be operated as a legitimate business without permitting said acts of lewdness" is erroneous and unsupported. The injunction totally putting the corporation out of business was too drastic and its terms were overbroad. The trial court should have limited the injunction to the illegal acts of lewdness and given the corporation an opportunity to function as a legitimate enterprise. (emphasis added)

The situation here is analogous. Neiman was working in a legitimate business -- as a paralegal for an attorney. The Bar claimed that while working as a paralegal that some of his conduct constituted UPL. Neiman has never before been enjoined for engaging in

UPL.[4] So, this Court is obligated to limit the injunction to acts that constitute UPL; otherwise, the injunction is overbroad.

In deciding whether Neiman, a paralegal, engaged in the unlicensed practice of law, the context in which the conduct occurred must be stressed. At all times pertinent thereto, Neiman was employed as a paralegal by a member of the Florida Bar. Within this employment context, Neiman was charged with "participating in settlement negotiations with a tortfeasor's attorney or a tortfeasors' non-lawyer representative." The acts alleged were done at the instruction of, direction of, under the guidance of, and with his employing attorney's knowledge and consent.

Neiman's "participation in settlement negotiations" must also be viewed within the context of an article published in 1991 by Assistant Director of the Unlicensed Practice of Law Department of The Florida Bar, Lori S. Holcomb. The gist of the article was that a paralegal may relay offers and counteroffers to opposing counsel and insurance adjusters, and may also relay factual information to those same parties. Neiman relied on this article.[5] Years after the article was published, a complaint was filed with the Bar critical of Neiman being involved in the negotiation process. The Bar did not seek to sanction Neiman. This re-affirmed his belief that he could "participate in settlement negotiations.

Applicants for admission to the Bar take bar review courses dealing with specifically enumerated "law subjects," but the subjects did not include "negotiations"

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[4] Before 1991, Neiman was charged with UPL for conduct that occurred before he began working for, and under the supervision of an attorney. Neiman thought that a public adjuster's license authorized him to represent a person with an insurance claim. In the mid-1990's, while working for, and under the supervision of an attorney, a UPL complaint was filed against him by an opposing counsel. The Bar dismissed the complaint and Neiman was not sanctioned.

[5] Neiman's testimony August 2, 2000, morning session, p. 13-14.

or "settlement negotiations." "Negotiation" or "settlement negotiation" has never been a required course in law school. "Negotiation" or "settlement negotiation" has never been a subject, or area tested on the Florida Bar Exam.[6]

Besides this Court has already declared that participating in settlement negotiations is not the unlicensed practice of law. In a small claims proceedings, a non-lawyer may appear on behalf of a party at a mediation if the non-lawyer has the party's authority to appear and has full authority to settle without further consultation. Fla.R.Civ.P. 1.750(e). In a small claims case, a non-lawyer, not even acting under the supervision or guidance of an attorney, may appear on behalf of a claimant or tortfeasor and negotiate a settlement up to $5000. If participating in negotiating a settlement on behalf of a claimant is the unlicensed practice of law, then this Court has created an absurd situation. A non-lawyer may go into court, represent a party and negotiate a settlement up to $5000. But, a non-lawyer may never, outside a small claims court, even "participate in negotiating a settlement."

The unlicensed practice of law is not dependent upon whether the conduct occurs before or after a lawsuit is filed. If conduct constitutes the unlicensed practice of law, it does not matter whether it occurs in the pre-suit stage, or after a lawsuit is filed. So, if the act of "participating in settlement negotiations" is the unlicensed practice of law, it does not matter whether it occurs in the pre-suit stage of a claim, or after a lawsuit is filed in court.

If the recommendations are affirmed in toto, the affect will be far more reaching than what Neiman will be able to do in the future. Without specifically declaring so, the Bar's Petition transforms the practice of personal injury law. In another recent case, the Broward County State Attorney's Office and the Florida Insurance Commissioner

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[6] Rule 4-22 Part A, The Rules of the Supreme Court Relating to Admissions to the Bar.

sought to transform the practice of personal injury law. In *State v. Mark Marks P.A.*, 698 So.2d 533 (Fla. 1997), this Court dealt with the insurance fraud statute,[7] which provided that any person who, with the intent to injure, defraud, or deceive any insurance company presents any written statement as part of, or in support of, a claim for payment of benefits pursuant to an insurance policy knowing that such statement contains any *incomplete* information concerning any fact or thing material to such claim commits a crime. The State Attorney reasoned that a claimant's attorney committed a crime by submitting an initial "offer-to-settle" letter to the tortfeasor's insurance company that omitted any of the claimant's medical reports (i.e., it was *incomplete*). This Court declared that conduct was not unlawful.

If this Court holds that a claimant's attorney's paralegal's participation in settlement negotiations with the tortfeasor's attorney or the tortfeasor's non-lawyer representative is UPL that ruling will completely transform the practice of personal injury law. Why? Because non-lawyers representing tortfeasors negotiate the settlement of legal disputes everyday. Consider the Risk Management Division of the Broward County Government has an entry-level position titled, "Claims Adjuster I." The job description, supplied by Broward County, provides, "(t)his is specialized technical work in the investigation, analysis, processing and adjustment of public liability and Worker's Compensation claims." The duties and responsibilities of an entry-level claims adjuster include:

> **Negotiates with claimants and attorneys within established limitations and under the direction of the supervisor.**
>
> **Attempts to effect equitable settlement without litigation.**
> (emphasis added)

[7] Section 817.234(1), Fla. Stat. (1989).

The job description provides that knowledge, abilities and skills required for the job include:

> **Knowledge of the general theory and content of public liability negligent and Worker's Compensation laws.**
>
> **Knowledge of techniques of investigation, adjustment and settlement.** (emphasis added)

The education and training experience for an entry-level adjuster to participate in the negotiation and settlement of public liability and Worker's Compensation claims is: "(g)raduation from high school supplemented by specialized training in insurance claims, practices and procedures; experience in claims processing including some experience adjusting bodily injury, property damage and Worker's Compensation claims; or any equivalent combination of training and experience." To participate in the adjustment of and settlement of claims, an entry-level adjuster must simply be a high school graduate with some on-the-job training. A Broward County Claims Adjuster I does not even have to have an insurance adjuster's license.

The Risk Management Division of Broward County employs non-lawyers with a high school education to negotiate with claimants and claimant's attorneys for the purpose of settling legal disputes -- bodily injury, property damage and worker's compensation claims. Consider, John Driver, a Broward County bus driver, rams his bus into the rear of Jane's car. Jane's bodily injury and property damage claim is against John Driver, individually, as the operator of the bus, and against Broward County, as the owner of the bus. If Jane wants to sue, she must name the bus driver, individually, as a defendant, because he is the active tortfeasor that makes Broward County liable. Jane's attorney makes a pre-suit claim against the bus driver and Broward County. When Broward County's non-lawyer/non-licensed claims adjuster negotiates a settlement and a release, the claims adjuster negotiates for <u>both</u> the driver

and for the taxpayers of Broward County. Apparently it is okay with the Bar for a non-lawyer, not under the supervision of an attorney, to participate in settlement negotiations on behalf of the individual tortfeasor and the county. Why? Because the Bar has not sought to enjoin Broward County's adjusters from negotiating settlements with claimants or claimants' attorneys. Yet, the Bar opines that a claimant's attorney's paralegal may not even participate in negotiations with Broward County' non-lawyer adjuster.

Likewise, in the private sector, motor vehicle insurance companies employ non-lawyer claims adjusters to negotiate bodily injury and property damage claims.[8] Depending on the amount of the damage claim, the non-lawyer insurance adjuster does not have to be a licensed adjuster.[9] Consider, Mr. Reckless, who is insured by Allways Pays Insurance, rear-ends Jane. Mr. Reckless policy provides $10,000 liability coverage and $5,000 property damage coverage. Jane has a bodily injury claim, with over $20,000 in medical bills and lost wages, plus a property damage claim. Jane's attorney calls Allways Pays, finds out the policy limits, and negotiates a settlement with

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[8] The Bar might suggest that this conduct is not the unlicensed practice of law, because the legislature has mandated that insurance adjusters be licensed. This argument is disingenuous for two reasons. First, some in-house adjusters do not have to be licensed. Moreover, Broward County Adjuster 1's negotiate and they are not licensed - at all. Second and most importantly, this Court has exclusive jurisdiction over what constitutes the "practice of law." See Article V, § 23, Florida Constitution. The legislature cannot create exceptions by simply mandating that conduct that would otherwise be the "practice of law" be licensed by some state agency.

[9] Pursuant to § 626.872, Fla. Stat. (1998), motor vehicle insurance companies may obtain temporary adjuster's licenses for new employees. The temporary license is effective for 1 year. "Under the temporary license, the licensee shall have the authority to handle only such classes of business as his or her [non-attorney] supervising adjuster is licensed to handle, except that the temporary licensee shall not be permitted by his or her employer to negotiate settlements with the insured or claimant for amounts in excess of $20,000." § 626.872(4)(f), Fla. Stat. (1998).

a non-lawyer, non-licensed adjuster for the policy limits. The non-lawyer adjuster represents individual, Mr. Reckless, as well as the insurance company. In negotiating a third party liability settlement, the general release sent by the insurance company releases not only the insurance company, but also the insured, individually, because the insured has potential liability above the insurance policy's limits.

Remember if Jane filed a lawsuit, she must sue Mr. Reckless. She is prohibited by law from suing the insurance company as a party, or even mentioning that Mr. Reckless has insurance. If a lawsuit were filed, Mr. Reckless' lawyer, hired by the insurance company, will always contend that he represents Mr. Reckless' interests, not the interests of the insurance company. Thus, legally and factually a non-lawyer insurance adjuster always represents a "client" (i.e., the insured tortfeasor) when a third party liability settlement is negotiated.

Consistent with the custom that participating in settlement negotiations is not the unlicensed practice of law, the North Broward Hospital District, a publically funded hospital district, employs "patient accounts collection representatives." The educational and experience requirements for the job are: a high school diploma or GED diploma, plus 2 years experience as a collector, or a financial counselor in a health care environment. The published job description is:

> collects receivables for patient care services, identifies, processes and authorizes refunds, write-offs, discounts, **settlements** and the adjudication of tax fund disbursements in order to ensure an adequate and constant cash flow and support the financial viability of the North Broward Hospital District. (emphasis added)

Thus, the North Broward Hospital District employs high school graduates, and authorizes them to make decisions to settle accounts receivables (unpaid bills).

When a patient is injured in a motor vehicle accident and is treated at a North Broward Hospital District hospital, if the patient does not have the money to pay for his

treatment, the patient's unpaid bill becomes an accounts receivable. By operation of law, the hospital has a lien on any third-party liability recovery. If the patient collects money from the tortfeasor or the tortfeasor's insurance company, the hospital lien law entitles the hospital to collect from the third-party liability recovery.

After obtaining a settlement in a personal injury case arising from a motor vehicle accident, the claimant's attorney routinely "engages in settlement negotiations" with the hospital regarding the claimant's unpaid hospital bill. The claimant's attorney routinely negotiates with the "patient accounts collection representative" to reduce or discount the amount the hospital will receive from the patient/claimant's third party recovery/settlement. This is particularly so when there is a small amount of insurance coverage. So, the claimant's attorney asks the hospital, through its non-lawyer negotiator, to reduce the amount the taxpayers will be reimbursed. Agreeing to such a reduction constitutes a substantial negotiation by a non-lawyer.

Within the context of the practice of personal injury law, claimant's attorneys routinely: (1) negotiate with non-lawyer hospital personnel for the purpose of settling unpaid bills for patient care services, (2) negotiate with unlicensed non-lawyers employed by the Risk Management Division of the Broward County Government, known as "claims adjuster I," to settle bodily injury and property damage claims, and (3) negotiate with private sector non-lawyers, commonly referred to as insurance adjusters, to settle claims. If "participating in settlement negotiations" is the practice of law, or is the unlicensed practice of law by a paralegal, the practice of personal injury law will substantially change by eliminating non-lawyer claims adjusters and non-lawyer patient account collection representatives. Young lawyers will have to be hired to replace the non-lawyers who presently negotiate the settlement of motor vehicle tort claims or the reduction of hospital bills. In seeking to enjoin, Neiman the Bar will have

this Court create "The Lawyer Full Employment Act" for all the new jobs it will create for lawyers.

Non-lawyers negotiate in other respects. Real estate foreclosures are definitely a legal dispute. It is not uncommon for a homeowner's attorney to negotiate, not with the bank's attorney, but with a non-lawyer representative of the bank the monetary terms of the payment of the arrearage in order to reinstate the mortgage.

Broward County, like municipal governments and the state government, has a Land Acquisition Department that acquires real estate and right-of-way for public use. The sellers are not always willing sellers. The Broward County Land Acquisition Department's Real Property Section has an entry-level position titled, "Property Agent I." The job description, supplied by Broward County, provides:

> **Conducts field negotiations for the purchase of real estate and right-of-way for public roads.**
>
> **Prepares legal documents and handles all closing details.**
> (emphasis added)

If the County wants to take a property to build a road, the Property Agent I conducts "negotiations" with the property owner, or the property owner's attorney to buy the property. What is potentially more adversarial than "taking" someone's home to build a road? The educational requirements for the entry-level position of Property Agent I are, "graduation from high school; experience in real estate appraising and sales work; or any equivalent combination of training and experience." No license is required. We, the taxpayers, have non-lawyers negotiating for us under very adversarial circumstances to resolve a legal dispute.

A Broward County Risk Management entry-level adjuster, who negotiates settlements with claimants and opposing counsel, within established limitations and under the direction of a supervisor, is not engaged in the unlicensed practice of law. A

Broward County Property Agent I, who "negotiates" with an adversarial, non-willing home owner's attorney to "take" their land, is not engaged in the unlicensed practice of law. A South Broward Hospital District employee who negotiates with a claimant's attorney to settle an unpaid hospital bill is not engaged in the unauthorized practice of law. Conversely, if the conduct of participating in the negotiation of settlements of legal disputes constitutes the unlicensed practice of law, then every person working as an entry-level adjuster, every entry-level property agent for Broward County, every South Broward Hospital District account representative, and every private sector insurance claims adjuster must be enjoined.

In 1998, the American Bar Association's standing committee on legal assistants conducted a survey of the utilization of legal assistants, also referred to as paralegals, among private practitioners. Regarding the use of legal assistants in the practice of real estate law, twenty-two percent (22%) of the law firms using legal assistants used legal assistants (paralegals) "to negotiate title insurance coverage." Title insurance coverage involves important legal rights. Title insurance coverage may significantly affect the marketability of a piece of real estate.

The Report recommends that Neiman be prohibited from speaking at mediations regarding his employing attorney's clients' claims, even with his employing/supervising attorney present. Non-lawyers may serve as arbitrators or mediators, and in some instances represent parties in arbitrations and mediations. "Mediation" is "the private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties reach an agreement." Black's Law Dictionary (1990). "Arbitration" is "a process of dispute resolution in which a neutral third party renders a decision after a hearing in which both parties have an opportunity to be heard. When arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision." Black's Law Dictionary (1990).

Thus, an "arbitrator" or "mediator" is a private, disinterested person chosen by the parties to assist in, or actually settle a disputed question.

In a voluntary arbitration or mediation a non-lawyer may serve as the arbitrator or mediator. The qualification of the arbitrator or mediator is controlled by the arbitration and mediation agreement, or by the rules of the organization supervising the arbitration or mediation. Unless the agreement of the parties provides otherwise, the arbitrator or mediator need not be a member of The Florida Bar. Alternate Dispute Resolution in Florida (Fla. Bar CLE 1989, 1991). Florida Legal Ethics, "Unlicensed Practice of Law," § 3.46, p. 3-27.

Consistent with the philosophy that a mediator does not have to be an attorney, this Court has declared that a county court mediator does not need to be a member of The Florida Bar. Rule 10.010, Florida Rules for Certified and Court-Appointed Mediators. Nor does a circuit court family mediator (family and dissolution of marriage issues) have to be an attorney. Fla.R.Civ.P. 1.760(b)(1). In these instances, the person moderating or refereeing the negotiations does not have to be an attorney.

This Court has already declared that non-lawyers may participate in settling claims at a mediation. First, in a small claims proceeding, a non-lawyer may appear on behalf of a party at a court-ordered mediation if the non-lawyer has the party's authority to appear and has full authority to settle without further consultation. Fla.R.Civ.P. 1.750(e). In a small claims proceeding the non-lawyer may not only participate on behalf of a third party, but he may enter into a binding agreement.

Second, this Court's own Mediator Qualifications Advisory Panel has opined that a non-lawyer and/or a paralegal can participate in a court-ordered settlement negotiation (mediation). In an advisory opinion issued July 3, 1999, for publication in the Dispute Resolution Center Newsletter, the panel was asked:

1. Can a non-lawyer assist an unrepresented party at a court-ordered mediation and participate in the negotiations?

2. Can a non-lawyer employee of an attorney negotiate on behalf of the attorney's client at mediation, if the attorney is present and all persons at the mediation know the non-lawyer's capacity?

The Advisory Opinion answered both questions in the affirmative. Regarding a non-lawyer appearing at a mediation and participating in settlement negotiations, the Opinion states:

> An unrepresented party may be accompanied by a non-party who may assist the party and participate in negotiations. For example, a husband may accompany a wife, a roommate may appear with a signatory tenant, a garage owner may bring the shop manager. In fact, there are instances in which negotiations may be hampered by the absence of such parties.

Regarding a non-lawyer paralegal participating in settlement negotiations at a court-ordered mediation, the Opinion states, **"[a] non-lawyer employee of an attorney may negotiate on behalf of the attorney's client at mediation if the attorney is present and all persons at the mediation are aware of the non-lawyer's capacity. In both this and the above instance, the agreement of all parties is required for the mediation to proceed."** Thus, a non-lawyer may participate in mediation settlement negotiations. Barring Neiman from doing what other non-lawyers may do is overbroad and violates his right to work in a lawful occupation. (emphasis added)

In summary a non-lawyer may participate in the following types of negotiations: (1) may work as an adjuster and negotiate settlements of legal disputes, (2) may work as a mediator to assist in negotiating a settlement between opposing parties, (3) may work as an arbitrator and settle a dispute (in a legally binding fashion) between

opposing parties, (4) may appear alone on behalf of a party in small claims mediation and negotiate a settlement, (5) may work as a hospital bill collector and negotiate discounts with lawyers, (6) may work in government to negotiate with home owners or their lawyers to "take" their property, and (7) may negotiate title insurance costs which substantially affects the first largest purchase a person usually makes - their home. By custom, practice, and court rule, "participating in negotiating" is not the unlicensed practice of law, and is lawful activity that non-lawyers engage in *daily*.

The case law relating to UPL does not suggest that a paralegal working for an attorney that participates in settlement negotiations has crossed the line. The common theme of the UPL cases is non-lawyers "hanging up their own shingle" and performing tasks for clients, or non-lawyers performing legal tasks on behalf of clients without any supervision by an attorney. *See State v. Foster*, 674 So.2d 747 (Fla. 1st DCA 1996) (Foster, a non-lawyer, set up shop and was representing a client at depositions. Foster was not working for, or working under the direction of an attorney); *The Florida Bar v. Riccardi*, 304 So.2d 444 (Fla. 1974)(a non-lawyer's active participation in questioning witnesses in depositions, without the presence and immediate guidance of a licensed attorney, constituted UPL); *The Florida Bar v. Moses*, 380 So.2d 412 (Fla. 1980)(Moses, a non-lawyer consultant specializing in labor relations, represented a school board at an unfair labor practice hearing, where he presented evidence, examined and cross-examined witnesses, conducted voir dire, made both written and oral motions, objected to evidence, filed written pleadings, and made decisions effecting important legal rights and obligations of his client); *The Florida Bar v. Town*, 174 So.2d 395 (Fla. 1965)(an accountant advertised in newspapers to be a specialist in the incorporation of businesses, and offered to handle all details in the formation of corporations); *The Florida Bar v. Schramek*, 616 So.2d 664 (Fla. 1993)(a non-lawyer operated a legal clinic prepared motions to reduce child support payments, gave legal

advice regarding the filing of an appeal, etc.); *The Florida Bar re Adv. Opinion - Non-lawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992)(drafting, execution, and funding of a living trust document constitutes the practice of law); *The Florida Bar v. King*, 468 So.2d 982 (Fla. 1985)(non-lawyers cannot "hang up a shingle"and counsel and advise clients how to select and fill out legal forms); *The Florida Bar v. Valdes*, 464 So.2d 1183 (Fla. 1985)(a non-lawyer cannot own and operate a business that prepares divorce complaints, or give advice regarding evictions); *The Florida Bar v. Mills*, 410 So.2d 498 (Fla. 1982)(a non-lawyer cannot give prisoners advice on procedures to follow for appeals, or interpret case law and statutes for prisoners); *Bauer v. State*, 610 So.2d 1326 (Fla. 2nd DCA 1992)(a non-lawyer cannot represent a criminal defendant in a court proceeding); *The Florida Bar v. Matus*, 528 So.2d 895 (Fla. 1988)(a notary public cannot own and operate an office that prepares immigration forms); *The Florida Bar re: Advisory Opinion HRS Non-lawyer Counselor*, 547 So.2d 909 (Fla. 1989)(non-lawyers cannot represent HRS in juvenile dependency proceedings); *The Florida Bar re: Advisory Opinion Non-lawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992)(a corporation or other non-lawyer cannot draft living trusts and related documents for clients); *The Florida Bar v. Gentz*, 640 So.2d 1105 (Fla. 1994)(non-lawyers cannot hold themselves out to the public as a panel of judges capable of granting divorces); *The Florida Bar v. Sperry*, 140 So.2d 587 (Fla. 1962)(a non-lawyer cannot hold himself out to the public as, and maintain an office as a patent attorney); *The Florida Bar v. Catarcio*, 709 So.2d 96 (Fla. 1998)(a non-lawyer prohibited from running an advertisement in a weekly newspaper, which offered his professional services for bankruptcy, meeting with clients and counseled them regarding their eligibility to file for bankruptcy, and assisting the clients in completing the bankruptcy petition); *The Florida Bar v. Davide*, 702 So.2d 184 (Fla. 1997)(a non-lawyer prepared complaints for clients, and his name and social security number

appeared on bankruptcy petitions in the space for the attorney's name and Bar number); *The Florida Bar v. Smania*, 701 So.2d 835 (Fla. 1997)(two non-lawyers represented a wife in a divorce proceeding and subsequently filed her brief when appealed the divorce action); *The Florida Bar v. York*, 689 So.2d 1037 (Fla. 1996)(a non-lawyer working by himself gave advice and assistance in obtaining monetary settlements in accident cases).

Recognizing that paralegals have been assigned more duties by attorneys, The Florida Bar recently recommended the following rule to clarify issues regarding the proper role of paralegals. The proposed change to Rule 4-5.3 provides:

> While a paralegal or legal assistant may perform the duties delegated to them by the lawyer **without the presence or active involvement of the lawyer**, the lawyer shall review and be responsible for the work product. (emphasis added)

The proposed rule change supports Neiman's position. It provides an attorney may delegate duties to a paralegal and allow the paralegal to perform the duties without the presence or active involvement of the lawyer, so long as the lawyer is ultimately responsible for reviewing and approving the task performed. The lawyer does not have to stand over the paralegal while the paralegal is performing the tasks, so long as the lawyer is ultimately responsible for reviewing and approving the paralegal's work.

The natural retort by the Bar is that a lawyer cannot allow a paralegal to "participate in settlement negotiations," because it will jeopardize the client's rights. Nonsense, a claim is not finally settled until the client declares it settled. In Florida, a claimant's attorney has no general authority, by virtue of his status as an attorney, to settle the litigation. The employment of an attorney does not, of itself, give the attorney authority to compromise the client's cause of action or settle the client's claim. *Lechuga v. Flanigan's Enterprises, Inc.*, 533 So.2d 856 (Fla. 3d DCA 1988); *Sockolof v. Eden*

Point North Condominium Association Inc., 421 So.2d 716 (Fla. 3d DCA 1982); and *Rushing v. Garrett*, 375 So.2d 903 (Fla. 1st DCA 1979).

This Court's *Sperry* test,[10] which is the litmus test for determining UPL, provides that the conduct must affect important legal rights of the client. As a general rule, a claimant's attorney cannot bind his client to a settlement offer thereby affecting his rights. The client/claimant must approve or accept the offer. If the attorney does not have the authority to settle the client's claim, then the paralegal working for the attorney has no such authority. **In effect, by participating in negotiations, the paralegal is merely assisting in the preparation of a proposal for the client to accept or reject.** (emphasis added)

In conclusion, "participating in settlement negotiations" is not the unlicensed practice of law. Therefore, a paralegal, under the guidance and supervision of his employing attorney, may "participate in settlement negotiations."

Point 2

IT ABRIDGES THE EQUAL PROTECTION CLAUSE TO ENJOIN A CLAIMANT'S ATTORNEY'S PARALEGAL FROM PARTICIPATING IN SETTLEMENT NEGOTIATIONS WITH A TORTFEASOR'S ATTORNEY OR A TORTFEASOR'S NON-LAWYER REPRESENTATIVE, WHILE NOT ENJOINING A NON-LAWYER REPRESENTATIVE OF A TORTFEASOR FROM DOING THE SAME THING.

Equal Protection "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). The Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. *Reed v. Reed*,

[10] *The Florida Bar v. Sperry*, 140 So.2d 587 (Fla. 1962).

404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971). An equal protection analysis, therefore, requires as a "preliminary step" a determination of "whether persons who are similarly situated are subject to disparate treatment." *Johnson v. Smith*, 696 F.2d 1334, 1336 (11th Cir. 1983).

For years Broward County has openly hired and employed non-lawyers to negotiate settlements with claimants and claimant's attorneys. As stated previously the Risk Management Division of the Broward County Government maintains an entry-level claims adjuster position. The duties and responsibilities of an entry-level claims adjuster include:

> Negotiates with claimants and attorneys within established limitations and under the direction of the supervisor.
>
> Attempts to affect equitable settlement without litigation

The entry-level adjuster's knowledge, abilities and skills should include:

> Knowledge of the general theory and content of public liability negligent and Worker's Compensation laws.
>
> Knowledge of techniques of investigation, adjustment and settlement

Insurance companies are in the business of insuring individuals (insureds) against potential tort claims. When an insured commits a tort, the insurance company represents its insured in the legal dispute. It is routine and common practice for the insurance company's non-lawyer adjuster to negotiate a settlement with the claimant's attorney.

The Bar has no intention of putting insurance adjusters and unlicensed Broward County claims adjusters out of business. Yet, the Bar's interpretation prohibits a claimant's attorney's paralegal, working under supervision, from performing the same task -- participating in settlement negotiations. How is it rational for the tortfeasor's insurance company's non-lawyer, working under supervision, to negotiate a settlement,

but to prohibit a claimant's attorney's non-lawyer employee from doing the same thing? There is no "rational basis" for this disparate treatment.

However, if a claimant's attorney's paralegal, under the guidance and supervision of his employing attorney, is permitted to participate in settlement negotiations there is no disparity of treatment.

Point 3

THE RECOMMENDATIONS ARE OVERBROAD, SUCH THAT NEIMAN IS PROHIBITED FROM PERFORMING TASKS, OR ENGAGING IN ACTIVITIES THAT A PARALEGAL ROUTINELY PERFORMS, THEREBY DENYING HIM THE RIGHT TO WORK AS A PARALEGAL.

The Referee's recommendations are overbroad, such that Neiman is forever barred from working as a paralegal. The Report recommends that Neiman be prohibited from (1) preparing pleadings, motions, or any other legal document for "others," which would include the attorney that employs him, (2) suggesting or participating in the accumulation of evidence in support of any legal claim, which would include action taken under the guidance and supervision of his supervising attorney, or (3) having direct contact with any client of his supervising/employing attorney, or opposing counsel, or any third party involved in his employing attorney's client's legal matter.

If the recommendations are affirmed, Neiman cannot draft any pleading for his employing attorney, including but not limited to a simple notice of appearance. He cannot participate in the accumulation (i.e., acquisition) of evidence, such as simply picking up medical records from a custodian of records. He cannot have any direct contact with any person involved in a clients's legal matter. This means he cannot perform a task as innocuous as answering the telephone, or scheduling a meeting

between his employing attorney and an expert witness, or coordinating a mutually convenient time with opposing counsel to take depositions. The latter prohibition -- against direct contact with any client of his supervising/employing attorney, or opposing counsel, or any third party involved in his employing attorney's client's legal matter -- effectively bars him from the premises of a law firm. He cannot step foot inside his employer's law office for fear that he might come into contact with a client, etc.

These recommendations are clearly overbroad and must be rejected. Otherwise, Neiman will be denied the right to work in the lawful occupation of a paralegal. Consider in *Austin v. Mid State Fire Equipment of Central Florida, Inc.*, 727 So.2d 1097 (Fla. 5th DCA 1999), Austin worked for a fire equipment company and signed a non-competition agreement. He quit that company and began working for a competitor. His first employer obtained an injunction that totally prohibited him from working for the competitor. On appeal, the court found the injunction to be overbroad. The court concluded that the injunction should be narrowed to allow him to work as a service technician, so long as he did not divulge price information of his former employer, or approach his former employer's customers. Likewise, the proposed injunction in this case must be modified to allow Neiman to perform the tasks, which are regularly performed by a paralegal.

CONCLUSION

The challenged recommendations are overbroad and deny Neiman the right to work in the lawful occupation of a paralegal. Therefore, the scope of the proposed injunction must be limited, or modified as follows:

This Court should order that a paralegal may participate in meetings, settlement negotiations, mediations, or telephone discussions as a paralegal so long as: (1) his

employing attorney, his employing attorney's associate, and/or the employing attorney's co-counsel is supervising him; (2) his employing attorney affirmatively represents to his client, and to the opposing party that the employing attorney remains responsible for the paralegal's conduct and (3) at the beginning of any meeting or telephone conference that all parties are advised of the paralegal's status. Additionally, when a paralegal has dealings with any parties, other than his own employing attorney, he may in participating in these discussions pass on offers or factual information, if those offers and factual information have been approved in advance by his employing attorney. Consistent with this pronouncement, Neiman should be permitted to participate in settlement negotiations.

This Court should order that under the guidance and supervision of his employing attorney: (1) that Neiman may prepare pleadings, motions, or any other legal document for the attorney that employs him, and (2) that Neiman may participate in the accumulation of evidence in support of any legal claim.

It should be further ordered that Neiman, like all paralegals, may have direct contact with clients of his employing attorney, or opposing counsel, or any third party involved in his employing attorney's client's legal matter, so long as he does render legal advice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on **May 17, 2001** to:

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