IN THE FLORIDA SUPREME COURT
Supreme Court No. 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
REPLY BRIEF OF THE APPELLANTS, BRIAN NEIMAN and BRIAN NEIMAN, INC.

HICKS, ANDERSON & KNEALE, P.A.
799 Brickell Plaza - 9th Floor
Miami, Florida 33131
(305) 374-8171; (305) 372-8038 (fax)
By: H. Dohn Williams Jr.

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CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned counsel certifies that this brief has been typed in Times New Roman 14 point type.

All emphasis in this brief is supplied by counsel unless otherwise noted.

LEGAL ARGUMENT

Point 1

"Participating in settlement negotiations" is not the practice of law. Conversely "participating in settlement negotiations" is not the unlicensed practice of law.

In its brief, the Bar appears to criticize Neiman for not disputing and contesting every finding of fact in the Referee's Report (Report). The Bar has a short memory. Shortly after the Bar filed its Petition, and again at an initial status conference before the Referee, Neiman attempted to settle this matter. Even though he denied committing these acts, Neiman had no objection to a permanent injunction that prevented him 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). Additionally, Neiman had no objection to being enjoined from engaging in activities that the Bar had no proof that he

committed. The Petition's "laundry list" of violations, and request for sanctions included uncharged conduct. For example, the Bar did not want him receiving legal fees from clients or other persons. The Bar had no proof that he had done so; nevertheless, it wanted him enjoined from doing so. **Neiman's position was as follows: I cannot do these things. I did not do these things. I do not want to do these things. Nonetheless, I will agree to be enjoined from doing these things. Now, let's get to the crux of our legal dispute.** In other words, based on your crazy neighbor's word,[1] your father wants to prohibit you from jumping off the roof <u>again</u>. You did not do it. You do not want to do it, so why argue about it. Just agree not to do it. (Emphasis added)

Neiman has two primary concerns about the Report. First, is the conduct of a paralegal "participating in settlement negotiations, under the guidance and supervision of an attorney, but <u>not</u> actually settling any claims," the practice of law and/or the unlicensed practice of law (UPL)? Is the conduct a paralegal "appearing at a mediation with his supervising attorney and participating in settlement negotiations, but <u>not</u> actually settling any claims,"the practice of law and/or the unlicensed practice of law (UPL)? Is the proposed injunction overbroad?

Second, there are other provisions of the proposed injunction that are overbroad, because they enjoin Neiman from performing lawful tasks that are regularly performed by paralegals. The Report wants him prohibited from (1) preparing pleadings, motions, or any other legal document for "others," **which would include the attorney that**

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[1] The "crazy neighbor" analogy is used because the record reflects that a husband and wife standing next to each other gave directly contradictory testimony. The husband said the first time he and his wife met Neiman that he told them he was a paralegal. In contrast, the wife said that for months after she met Neiman she thought he was an attorney.

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, which would bar him from the premises of a law office. (Emphasis added)

Rather than sticking to the issues raised, the Bar comments on facts that it opines will inflame this Court, such as Neiman's income. The Bar did not allege "fee splitting" because there was none. After an exhaustive audit of both Neiman's financial records and those of his employing attorney, the Bar's auditor concluded there was no proof of fee splitting. The Bar's Petition cites Neiman's "gross income," and suggests it is his "net income" without explaining. Neiman was a workaholic. He worked 60 to 80 hours, and sometimes 100 hours, per week at a rate of $90 to $100 per hour. If he worked 80 hours per week for 50 weeks per year at the rate of $100 per hour, Neiman's gross income from his paralegal duties is $400,000 per year.

In addition to being paid for his paralegal duties, he provided his employing attorney a "turnkey" operation. Neiman provided luxury office space (he had a mortgage payment); he managed and paid the clerical staff; he provided office equipment and telephones; and he paid other bills such as the telephone bill. These were costs Neiman paid to third parties. In providing the "turnkey" operation and advancing the money to pay these monthly expenses, Neiman received a fee. When your neighborhood garage replaces the generator on your car, the garage buys the generator from a third party, an automobile parts warehouse. The garage charges you an hourly rate for installing the generator. Obviously, you are charged for the cost of the generator. What many people

do not realize, the garage also adds a markup to the automobile part (i.e., the generator), which is akin to Neiman's fee for providing the "turnkey" operation. Thus, the garage receives an hourly fee for performing the work and it makes a profit on the automobile part. This is legal. Therefore, Neiman's financial arrangement was no more illegal than the average neighborhood garage.

The Bar's brief does not address the fact that this Court permits nonlawyers to participate in settlement negotiations and actually settle disputed matters in court. In a small claims proceedings, a nonlawyer may appear on behalf of a party at a mediation if the nonlawyer 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 nonlawyer, not even acting under the supervision or guidance of an attorney, may appear on behalf of a claimant or tortfeasor and actually negotiate a settlement up to $5000. Thus, the act of "participating in settlement negotiations" is not *per se* the unlicensed practice of law. In allowing nonlawyers to negotiate settlements for third parties in a small claims proceeding, this Court has necessarily concluded that the "act of negotiating a settlement" is not a skill that only lawyers possess.

We know within the context of the practice of personal injury law, claimant's attorneys routinely: (1) negotiate with nonlawyer hospital personnel for the purpose of settling unpaid bills for patient care services, (2) negotiate with unlicensed nonlawyers 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 nonlawyers, commonly referred to as insurance adjusters, to settle claims.

Outside the realm of personal injury law, on a daily basis nonlawyers participate

in the following types of negotiations: (1) may work as a mediator to assist in negotiating a settlement between opposing parties, (2) may work as an arbitrator and settle a dispute (in a legally binding fashion) between opposing parties, (3) may appear alone on behalf of a party in small claims mediation and negotiate a settlement, and (4) may work in government to negotiate with home owners or their lawyers to "take" their property.

A fact glossed over by the Bar is that Neiman never actually settled a case. Neiman participated in settlement discussions, but did not actually settle any case. While the nonlawyer Broward County Risk Manager and the nonlawyer private sector insurance adjuster can actually settle a claim, Neiman simply wants to aid his employing attorney by participating in settlement discussions.

Neiman cited the past decisional law of this State, which suggest that a paralegal working for an attorney that participates in settlement negotiations has not crossed the line. The common theme of the past UPL cases involving nonlawyers is a nonlawyer "hanging up his own shingle" and performing tasks for clients, or nonlawyers performing legal tasks on behalf of clients without any supervision by an attorney. In response to this argument, the Bar cited a string of Florida cases that support, rather than dispute, Neiman's position. The following cases cited by the Bar concern nonlawyers performing legal tasks on behalf of clients without any supervision by an attorney -- *The Florida Bar v. Walzak*, 380 So.2d 428 (Fla. 1980); *The Florida Bar v. Abraham & Christiansen, Inc.*, No. 90,568 (Fla. February 4, 1999); *The Florida Bar v. Goforth and Cavenaugh, et al*, No. 89.697 (Fla. March 14, 1996); *The Florida Bar v. Florida One Stop Financial Services, Inc.*, No. SC00-1231 (December 7, 2000). The Bar also cited *The Florida Bar v. Cohen*, 560 So.2d 785 (Fla. 1990), which concerned an attorney who

was suspended for 91 days, but who continued his solo practice while under suspension. This case is hardly analogous to the point raised by Neiman.

Paralegals can be important support personnel in the negotiation process. In the practice of civil law, paralegals perform significant tasks. For example, in the undersigned's law firm, paralegals review all medical records and prepare abstracts. Paralegals interview prospective witnesses. Paralegals abstract all witness statements and depositions. Paralegals are liaisons between the attorney and expert witnesses; they confer with experts as to their findings. In this age of automatic cameras and camcorders, some paralegals take photographs or videotapes of people or places pertinent to the claim. After preforming these tasks, paralegals have a detailed knowledge of the facts. Aside from gathering the facts, paralegals perform legal research. In this era of computerized legal research, a tremendous amount of case law can be downloaded and printed out in a few minutes. Someone still has to read it. Paralegals review the case law and cull out the applicable cases for the attorney's review.

A paralegal's participated in a court-ordered mediation does not constitute UPL or jeopardize a client's claim. The mediation process works as follows. At a prearranged time, the plaintiff, the plaintiff's attorney and the plaintiff's paralegal meet with the mediator and the defendant's representative, usually the insurance adjuster, and the defendant's attorney. All these people meet in a joint session with each side having the opportunity to present a short opening presentation outlining the pertinent facts and the applicable. The opening presentation is usually posturing by both sides. The plaintiff's lawyer is trying the convince the insurance adjuster, who holds the strings to the pocketbook, that his client has valuable claim worth the money demanded. Conversely,

the defendant's lawyer is trying to convince the plaintiff that the picture painted by his attorney is just that, and that his claim to worth a lot less.

After the opening presentation, the plaintiff and his representatives are separated from the defendant and his representatives; they are put inti separate rooms. Thereafter, the mediator moves back and forth between the two rooms discussing the claim and relaying proposals. The mediation process is an informal proceeding not governed by the rules of evidence.

Within this context, the paralegal can assist the attorney by presenting his detailed knowledge of the facts and the case. Other than the brief opening presentation, the plaintiff, the plaintiff's attorney, and the plaintiff's paralegal are separated from opposing counsel and the defendant. The overwhelming majority of the time, the adversaries have no direct contact with each other, because are in different rooms. Nothing anyone says in the individual caucus may be revealed to anyone without the consent of the disclosing party. Rule 10.360(b). Thus, if the plaintiff's paralegal puts in his "two cents" into the discussion, the plaintiff and the plaintiff's attorney can veto any disclosure of the paralegal's comments.

If an agreement is reached, all the parties rejoin the mediator in a joint session where the mediator and the attorneys formulate the wording of the settlement agreement. Usually, the terms and conditions of the settlement are reduced to a handwritten settlement that is signed on the spot to eliminate buyer's remorse.

If no agreement is reached at the mediation, no harm is done. Anything said during the mediation session is confidential. Rule 10.420(a)(3). The rule of confidentiality is to promote frank discussion, instead of posturing. Thus, nothing the

plaintiff's paralegal says may be used against the plaintiff.

The in-person settlement conference is also a preplanned meeting, but it is more informal than the mediation. The actual plaintiff and defendant may or may not be present. **The attorneys for the adversaries are present with whatever assisting personnel they deem appropriate.** The in-person settlement conference is not governed by the rules of evidence. Nothing said during an in-person settlement conference is binding. Nothing said in an in-person settlement conference may be used against the opposing party by operation of Section 90.408, Florida Statutes, relating to offers of compromise and settlement. Thus, none of the frank discussion, including the plaintiff's paralegal's comments, may be used against the plaintiff.

Telephonic settlement discussions may be the most informal of all. Usually, it is an informal discussion. Often the telephone conversation is not conducted pursuant to prearranged agreement to speak on "Tuesday at 9:00 a.m." Thus, the participants to the telephone conversation may vary depending on who is available to participate. However, nothing said in a telephonic settlement discussion may be used against the opposing party by operation of Section 90.408, Florida Statutes, relating to offers of compromise and settlement. The Bar's concern about the lack of a supervising attorney's participation can be remedied as follows: The paralegal may participate in telephonic settlement discussions, so long as his employing attorney is present and supervising him.

In summary, whether the settlement discussions be at a mediation, in-person, or on the telephone, the paralegal's supervising attorney is present, supervising the paralegal and ultimately responsible for his conduct.

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 nonlawyer representative, while not enjoining a nonlawyer representative of a tortfeasor from doing the same thing.

The Bar says plaintiff's paralegals are not being treated differently than Broward County's claims adjusters, because they are "negotiating" for the person that employs them. While they may be negotiating on behalf of their employer, they are also negotiating on behalf of a third party with a lot at stake. If a Broward County bus driver causes an accident, both he and his employer are tortfeasors. The nonlawyer Broward County claims adjuster is "negotiating" for the bus driver, who certainly does not want a judgment against him, individually.

Contrary, to the Bar's assertion that the private sector nonlawyer, commonly referred to as an insurance adjuster, is "negotiating" for their employer (insurance company), the insurance adjuster is suppose to be "negotiating" on behalf of the insured. Plaintiffs lawyers have long contended that the Bar's position is correct; that the insurance adjuster is not "negotiating"with the insured's best interest at heart. The nonlawyer insurance adjuster's "settlement negotiations"directly affect the insured. If the nonlawyer insurance adjuster takes the position there is no liability and refuses to settle the claim for policy limits, as demanded by the claimant and the claimant obtains a verdict in excess of the policy limits, the insured may be responsible for the payment of the excess verdict. The insured may be left asking himself, what good did insurance do me.

Thus, nonlawyer claims adjusters not only are participating in settlement

discussions, they are making the final decisions about actually settling the claim. Neiman does not want to actually settle claims, he merely wants to participate in the settlement discussions.

Point 3

The Report recommends that Neiman be prohibited from performing tasks, or engaging in activities that a paralegal routinely performs. These recommendations are overbroad and deny Neiman the right to work in the lawful occupation of a paralegal.

The Bar wants Neiman totally banned from any law office. Therefore, its brief does not directly address, the specific recommendations that Neiman contends are overbroad. The Report recommends that Neiman be prohibited from preparing pleadings, motions, or any other legal document for "others" that includes the attorney that employs him. Neiman does not want to prepare pleadings, etc for third parties, like the divorce kit mills. He simply wants to prepare pleadings, etc for the attorney that employs him.

The Report recommends that Neiman be prohibited from suggesting or participating in the accumulation of evidence in support of any legal claim. This would include such tasks as picking up documents or taking photographs of a dented fender.

The Report recommends that Neiman be prohibited from 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. 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 employers law office for fear that he might come into contact with a client, etc.

The Bar ignored discussing these specific recommendations, because it knows they are overbroad. If enacted these recommendations will violate Neiman's right to work in the lawful occupation of a paralegal.

CONCLUSION

The Report's recommendations should be adopted in part, rejected in part, and modified as set forth below. Regarding overbroad provisions, which effectively deny him the right to work in the lawful occupation of a paralegal, the proposed injunction must be modified as follows: 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. Neiman, like all paralegals, should be able to 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. 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 present and 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.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed and/or hand-delivered on April 2, 2001 nunc pro tunc March 26, 2001 to:

Jacquelyn Plasner Needelman
The Florida Bar
444 Brickell Ave, Suite M100
Miami, FL 33131

Allan James Sullivan
Miami Center, Suite 2550
201 S. Biscayne Blvd.
Miami, FL 33131

Mary Ellen Bateman
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

HICKS, ANDERSON & KNEALE, P.A.
799 Brickell Plaza, 9th Floor
Miami, Florida 33131
(305) 374-8171; (305) 372-8038 (fax)

By:_____
H. Dohn Williams, Jr.
Florida Bar No. 166087