

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLIE EASA FARAH JR.,

Respondent.

Supreme Court Case No. SC22-472

The Florida Bar File No.
2018-00,181 (02A)

RESPONDENT CHARLIE EASA FARAH JR.'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant The Florida Bar will be referred to as the “Bar.” Respondent Charlie Easa Farah Jr. will be referred to as “Farah.” Farah will use the same symbols as found in the Bar’s Initial Brief when identifying exhibits introduced at the hearing before the Referee, the Referee’s Report, and the transcript of the final hearing. The exhibit numbers align with the designations made by the attending court reporter (T:4-5). The Bar’s Initial Brief will be referred to by “IB.”

STATEMENT OF THE CASE AND FACTS

I. Background

a. Overview of *Engle* litigation, 1994-2008

In 1994, a Miami law firm filed a class action lawsuit in Miami-Dade County styled *Engle, et al. v. R.J. Reynolds Tobacco Co., et al.* The complaint alleged that major tobacco manufacturers manipulated nicotine levels and concealed information about the addictiveness of the drug (ROR:4; TFB-Ex. 1, pg. 7).

A jury awarded \$145 billion in punitive damages to the class plaintiffs in 2000. In 2003, the Florida Third District Court of Appeal reversed the class-wide award and decertified the class. In *Engle v. Liggett Group*, 945 So. 2d 1246 (Fla. 2006), the Florida Supreme Court affirmed the Third District Court of Appeal and approved decertification of the class (ROR:4; TFB-Ex. 1, pg. 7).

The Supreme Court then created a method for the 700,000+ former *Engle* class members to initiate individual claims against tobacco manufacturers and established a deadline for the former class members to file suit (ROR:4-5; TFB-Ex. 1, pg. 7). Thousands of “*Engle* progeny” cases were filed thereafter in state and federal courts.

b. Farah & Farah's tobacco case intake and association with Wilner

Farah's firm, Farah & Farah, began work on tobacco cases about the time the Florida Supreme Court decertified the *Engle* class (ROR:5). Potential clients contacted the firm regularly beginning in 2006 (T:38). Farah & Farah independently evaluated cases of over 1,000 potential tobacco plaintiffs with whom they communicated. Farah & Farah contracted with the clients using signed contingency fee agreements, statements of client's rights, and medical record authorizations (ROR:5-6).

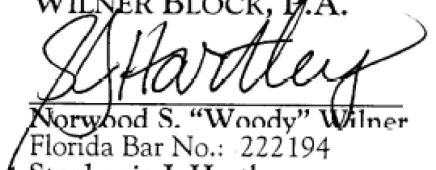
Norwood S. Wilner began representing tobacco plaintiffs in 1995. He was the lead attorney the first time a jury verdict against a tobacco manufacturer was affirmed on appeal. By 1998, Wilner represented more than 3,000 tobacco clients in Florida (ROR:5; R-Ex. 14, pg. 2).

After decertification of the *Engle* class, Farah & Farah associated with Wilner's law firm to prosecute tobacco cases because of his well-known expertise in tobacco-related litigation (ROR:7). The two firms agreed to allocate the significant labor and expense required to prosecute *Engle* lawsuits against the tobacco industry. Wilner was lead counsel. His firm was fully responsible for filing complaints and pleadings, as well as conducting trials, hearings, and discovery. This included the 163 clients Farah & Farah originated. Farah & Farah agreed to provide robust personnel

and back-office support and lead the efforts to obtain compensation for tobacco plaintiffs from the *Engle* Trust Fund (ROR:2, 7). The *Engle* Fund and Farah's management of it are discussed further below.

c. Litigation in the U.S. District Court, Middle District of Florida

Wilner filed lawsuits for over 4,432 people before the filing deadline, including the 163 clients originated by Farah & Farah (ROR:2). Wilner or another lawyer from his firm signed the complaints. Farah's name and that of his firm appeared type-printed in the list of additional counsel below the names of lawyers in Wilner's firm (ROR:3). An example is below:

WILNER BLOCK, P.A.

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Florida Bar No.: 222194
Stephanie J. Hartley
Florida Bar No.: 0997846
Wilner Block, P.A.
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Douglas & London, P.C.
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Attorneys for Plaintiffs

(See R-Ex.5.) The evidence presented to the Referee was undisputed that Mr. Farah did not actually sign any of those complaints or any subsequent court papers. Farah testified that Wilner did not ask him if Farah's name could be put on the complaints (T:93).

As noted above, the *Engle* class litigation gave rise to a multi-billion-dollar verdict in the early 2000s, which was later set aside on appeal. Before the verdict was set aside, counsel for the parties negotiated the creation of a trust fund of \$600 million that would benefit class members, regardless of the ultimate outcome on appeal (ROR:8; TFB-Ex. 1, pg. 7). Farah & Farah financially supported the large-scale and successful effort to assure that qualifying tobacco plaintiffs were compensated from the Trust Fund. Farah gave up his existing caseload and managed about 100 employees in the compilation and processing of Fund submissions. (*Id.*)

The District Court stayed *Engle* proceedings for two years beginning in October 2008 (ROR:9; TFB-Ex. 2, pg. 14). Wilner used the additional time to re-evaluate cases and voluntarily dismissed 499 cases (ROR:9; TFB-Ex. 2, pg. 15). In December 2010, the Court ordered Plaintiffs' counsel to review remaining cases to determine if additional cases were not viable, meaning they would not survive summary judgment or a motion to dismiss. Plaintiffs' counsel was to certify that each file had been reviewed for viability and

possible dismissal (ROR:9; TFB-Ex. 2, pg. 15-16). Farah played no role in this case review process, certification, or recommendation of disposition.

Wilner responded to the Court for the Plaintiffs in March 2011. Wilner certified his review of each case and recommended dismissal or closure of 254 more cases (ROR:9). Farah's name did not appear on that certification (T:98).

In April 2011, shortly after the lifting of the stay, Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") formally appeared in the *Engle* cases as co-counsel for the Plaintiffs. Lieff Cabraser is a national plaintiff's firm with extensive experience in mass tort litigation. Before agreeing to join as counsel, Lieff Cabraser evaluated the pending claims by gathering all paper files, electronic data, and records from Wilner's firm. Farah did not participate in the Lieff Cabraser review; his association with the litigation was unchanged by Lieff Cabraser entering as co-counsel (ROR:10).

At a hearing in June 2011, the District Court expressed concern about Wilner's March 2011 certifications, and was dubious of statements by Wilner about his level of communication with Plaintiffs (ROR:10; TFB-Ex. 2, pg. 21). Farah did not attend that hearing, although two lawyers from Lieff Cabraser attended and addressed the Court on issues including viability of cases. (*Id.*) The Court ordered questionnaires to be sent to all remaining Plaintiffs in

August 2011, with the responses to be submitted to the Court for review. Lieff Cabraser led the questionnaire effort (T:98-99).

In December 2012, the Motley Rice law firm joined as additional co-counsel for the *Engle* Plaintiffs. Motley Rice is a national plaintiff's firm headquartered in South Carolina, which also has mass tort litigation experience. Farah and his firm's association with the litigation again remained unchanged (ROR:11; R-Ex. 14, pg. 5).

In 2012 and 2013, the Court dismissed hundreds of cases. Less than 1,000 cases remained. Some of those cases went to trial; others settled (ROR:11). In early 2015, the parties announced a tentative global settlement between the tobacco defendants and the 415 remaining Plaintiffs (TFB-Ex. 1, pg. 9). As part of the settlement process, the Federal *Engle* Settlement Fund was established to disburse proceeds. This Settlement Fund was separate from the Trust Fund already in existence; Farah had been successfully obtaining recoveries for clients from that Fund (T:82). The Court ordered that funds for Plaintiffs' counsel fees and costs not be disbursed until it was determined whether sanctions should be imposed under Federal Rule of Civil Procedure 11 (ROR:11; TFB-Ex. 2, pg. 39-40).

The District Court appointed the United States Attorney for the Middle District of Florida as Special Master to investigate the Rule 11 issue and

provide findings and written recommendations to the Court (ROR:11). On July 29, 2016, the Special Master submitted a Report and Recommendation to the Court under seal, which concluded Wilner and Farah (but not attorneys from Lieff Cabraser or Motley Rice) violated Rule 11 (ROR:12; TFB-Ex. 1).

Farah had complied with discovery requests from the Special Master and asked to meet with the Special Master during the investigation but was never given the opportunity (TFB-Ex. 7; T:102). The Special Master recommended complete disgorgement of fees and costs due Wilner's firm and Farah & Farah under the global settlement, determined to be \$9.16 million. (TFB-Ex. 1, pg. 285-86.) The Special Master also recommended additional sanctions against Wilner individually, but not Farah, for alleged misrepresentations made to the Court. (TFB-Ex. 1, pg. 287-88.)

The District Court held a hearing on the sanctions issue on December 13, 2016. Then, for the first time during the *Engle* litigation, Farah personally appeared in court with Wilner and other counsel for the Plaintiffs. He was essentially an observer. The one time Farah addressed the Court, he expressed his remorse and apologized for the Court's frustration during the *Engle* litigation (TFB-Ex. 6, pg. 157-66).

The Court published its Opinion and Order on October 18, 2017, accepting in part the Special Master's recommendation and imposing \$9.16

million in financial sanctions against Wilner and Farah (TFB-Ex. 2). The Opinion and Order made no particularized findings as to Farah and mistakenly implied that Farah personally violated Rule 11 by making misleading or false statements to the Court, which only Wilner had done. The Court described Wilner as “substantially more responsible for what happened in the federal *Engle* litigation,” but did not apportion fault, concluding it was unnecessary because Wilner and Farah were “cosigners on each complaint.” (TFB-Ex. 2, pg. 144 n.78.) The Opinion and Order also publicly reprimanded both Wilner and Farah and referred the matter to The Florida Bar:

2. The Court refers the matters discussed herein to The Florida Bar for an investigation into:
 - a. Whether Norwood Wilner and Charlie Farah violated FRPC 4–3.1 by filing and maintaining frivolous and factually baseless lawsuits;
 - b. Whether Norwood Wilner and Charlie Farah violated FPRC 4–3.3(a)(1) by making a false statement of fact or law to this Court or failing to correct a false statement of material fact or law previously made to the Court.
 - c. Any other violations of the Florida Rules of Professional Conduct.

(TFB-Ex. 2, pg. 147.) The Court followed the Special Master’s recommendation and did not sanction Lieff Cabraser or Motley Rice. (TFB-Ex. 2, pg. 144.) The Court left the issue of division of attorney fees and costs

unresolved, instead directing Plaintiff's counsel to attempt to come to an agreement themselves. (TFB-Ex. 2, pg. 148.)

Farah & Farah moved the Court to reconsider its Opinion and Order (TFB-Ex. 3; ROR:14). Wilner separately moved for reconsideration. While the motions for rehearing were pending, Plaintiffs' counsel submitted their Joint Statement, requesting to attempt to mediate the fees issue with the Honorable Anthony Porcelli, Magistrate Judge of the Middle District. Judge Porcelli, as mediator, led the parties to the global settlement, which in turn led to the creation of the *Engle* Settlement Fund (TFB-Ex. 1, pg. 9).

The District Court subsequently ordered mediation (see R-Ex. 14), which led to a proposed resolution allocating fees and requesting that the District Court reduce the financial sanctions against Wilner and Farah & Farah by fifty percent. The District Court approved the mediated result (TFB-Ex. 5, pg. 8). The Court agreed to modify the financial sanctions, and Farah & Farah withdrew its motion for reconsideration and agreed not to seek appellate review of the Opinion and Order (TFB-Ex. 5, pg. 9).

Under the terms of the order modifying the sanctions, Farah and his firm forfeited its fifty percent share of \$4,329,668.43, representing the legal fees and costs it would otherwise have collected from the Federal *Engle* Settlement Fund (ROR:15; R-Ex. 14).

II. The Florida Bar v. Charlie Easa Farah Jr.

On October 24, 2017, The Florida Bar formally notified Farah of its grievance inquiry, which was one week after the District Court published the Opinion and Order. The Bar placed the matter on monitor status while the Farah and Wilner motions for reconsideration remained pending. The Bar reactivated the matter in March 2020. Farah submitted his response to the Bar in May 2020 (R-Ex. 14). The grievance committee found probable cause in October 2020. The Bar filed a formal complaint against Mr. Farah in April 2022.

The final hearing took place October 2 and 3, 2023. The Referee had previously scheduled a sanction hearing for October 17 and 18, 2023, which became unnecessary because the Referee found Farah did not commit any Bar violations. The Referee's Report recounted the evidence presented at the final hearing. Farah agrees with the Referee's characterization of the facts. The Referee's findings about the Bar's case and strategy are principally important:

The Florida Bar's case against Mr. Farah was premised on the accusation embodied in the Special Master's Report and Recommendation that Mr. Farah and his firm delegated his responsibilities to Mr. Wilner and failed to remedy the problematic issues, which led to the District Court's Opinion and Order. The Florida Bar determined it sufficient to similarly delegate the responsibility of proving Mr.

Farah's alleged misdeeds to the Special Master, whose burden of proof differed.

With all the resources at their disposal, the Bar decided to cut corners and simply accept the existing investigatory materials from the Special Master for its own purposes. The Bar did not undertake any independent investigation as recommended by the Special Master and ordered by the District Court. It did not interview Mr. Farah (or other Farah & Farah employees) before charging, or depose him in preparation for trial. Then, at trial, The Florida Bar called only one witness, Mr. Farah, rather than put forth any of the thousands of people (clients, attorneys, law firm personnel, court personnel, etc.) involved in the litigation or related investigation. The Referee found Mr. Farah credible. To the extent Mr. Farah was unable to recall specific information, that was due to the passage of more than a decade since the events in question. The Special Master's criticism of his conduct, which was later adopted by The Florida Bar in these proceedings, is traced to the arbitrary fact that another lawyer put Mr. Farah's name, rather than the name of his brother or another Farah & Farah attorney, on thousands of complaints.

(ROR:16-17.)

After the Referee issued his Report, the Bar announced that it would seek review by this Court. The Bar asks this Court to bypass a sanction hearing and impose a suspension of 30 days. Notably, the Bar agreed to a 91-day suspension for Wilner in connection with six Bar violations including bad faith and dishonesty to the District Court (R-Ex. 17). *Fla. Bar v. Wilner*, No. SC21-373, 2022 WL 619933 (Fla. Mar. 3, 2022).

SUMMARY OF ARGUMENT

The Referee carefully considered the testimony and evidence presented at the final hearing. Notably, the only witness called by the Bar was Farah. The Referee correctly found that Farah's testimony was credible, including testimony about his role in the *Engle* litigation. The Referee's Report is supported by competent substantial evidence. Based on this Court's deferential standard of review in such matters, the Referee's finding that Farah did not violate Bar rules should be affirmed.

The Referee correctly focused on the 163 cases Farah's firm had generated and vetted. The Referee also correctly concluded that Farah properly relied on Wilner's expertise in tobacco litigation and it was reasonable for Wilner to handle all pleading and litigation matters. The Referee correctly rejected the Bar's position that Farah became fully responsible for Wilner's actions or inactions, simply because Wilner's firm listed Farah's name on the complaints.

The District Court expressly instructed the Bar to investigate whether any violations of Florida Bar Rules had occurred. The Referee correctly found that the Bar conducted no such investigation. There is nothing in the record which refutes that finding. Federal Rule 11 sanctions and Bar discipline are distinct; the federal system has its own grievance process.

M.D. Fla. R. 2.04. (See R-Ex. 19.) The Bar simply sought to rely on prior findings from the Special Master's 2016 report and the District Court's 2017 Opinion and Order. Rule 11 sanctions, even if properly imposed, do not automatically constitute grounds for Bar discipline.

The Bar first opened its file on Farah in October 2017, six years before the final hearing. The Bar had ample resources, time, and opportunity to have investigated this matter and file formal charges against Farah concerning whether valid written contingency fee agreements had been obtained in all cases or whether adequate court approval for the fee sharing arrangement between Farah and Wilmer had been received. The Bar affirmatively chose not to do that.

While there is some case authority which could allow the Bar to argue for uncharged conduct, that should not be applied in this case. Such a tactic is contrary to Farah's due process rights and his right to have this matter resolved as efficiently as possible. This Court should reject any contention that oblique references in its Complaint to these issues were sufficient to protect Farah's due process rights. The Bar should not be allowed to wait and argue new charges that were never noticed or pled, particularly when the Bar was aware of the alleged uncharged misconduct for many years before it filed the formal Complaint.

The Referee correctly concluded Farah acted with diligence towards his clients and adequately communicated with them. The Referee further found Farah did not violate any Bar rules during the time leading to the filing deadline for *Engle* cases. Farah's methodology was sound when evaluating cases' viability, or reactivating cases which may have previously been considered nonviable depending on the status of the law.

Finally, the Bar takes the presumptuous position that not only will this Court reverse the Referee but also proceed to impose sanctions. That flies in the face of Bar rules. No sanction hearing was ever conducted below because the Referee correctly found no Bar discipline was warranted. In the event of a reversal, Farah is entitled to the opportunity to present his significant mitigation.

The Referee's Report should be affirmed in its entirety.

STANDARD OF REVIEW

The Bar acknowledges that this Court's review of the Referee's factual findings is limited, and those findings should be affirmed if, as here, they are supported by competent substantial evidence (see IB 24-25). *Fla. Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016) (Supreme Court should not re-weigh the evidence and testimony presented before the referee, or substitute its

judgment for that of the referee.).

Additionally, the Referee is responsible for assessing witnesses' credibility, and those assessments should not be overturned unless there is "clear and convincing evidence" that the Referee's judgment is incorrect. *Fla. Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991); *Fla. Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006) (quoting *Thomas*).

Moreover, the Referee's findings must be presumed correct. See *Fla. Bar v. Barrett*, 897 So. 2d 1269, 1275 (Fla. 2005); see also *Fla. Bar v. Whitney*, 132 So. 3d 1095, 1102 (Fla. 2013), which acknowledged the referee's superior vantage point to assess witness credibility (IB 24-25). See also *Picon*, 205 So. 3d at 764.

In this case, the Referee's findings of fact are supported by the record. His assessment of Farah's credibility, the only witness called by the Bar, is fully supported by the record evidence and should not be disturbed by this Court.

This Court should reject the argument that it should consider alleged uncharged rule violations at this stage of the proceedings.

ARGUMENT

I. The Referee Correctly Focused on Farah & Farah's 163 Originated Cases, and Correctly Concluded Farah's Reliance on Wilner Was Reasonable Under the Circumstances. (Restated)

The Referee considered the 4,269 cases Wilner's firm originated, though his Report focused on the 163 cases originated by Farah & Farah because the Bar did not prove Farah was jointly responsible for Wilner's lack of diligence (ROR:17). The Referee correctly concluded, after evaluating the evidence presented, that the Bar failed to clearly and convincingly establish that 1) for disciplinary purposes, Farah should be personally accountable for the cases Wilner originated and advocated, solely because Farah's name appeared (along with others) typed below lead counsel's signature on the complaints; 2) Farah and his firm unreasonably relied on Wilner's representations that the lawsuits Wilner originated were legally sound; or 3) Farah had been personally less than diligent as to the cases his firm originated.

The Bar argues that Farah cannot be "categorically excused" from the consequences of Wilner's actions because he assumed joint responsibility for the cases and was entitled to compensation in the event of successful

outcomes (IB 28).¹ The Referee correctly found the division of responsibility between the law firms was appropriate and did not make Farah responsible for Wilner's actions or inactions.

Though Farah's name appeared typed under that of the signing attorney on the complaints (with another lawyer), Farah was not involved in the litigation conduct that the District Court found to run afoul of Rule 11. At the final hearing, The Bar offered no authority supporting its contention that Farah should be held personally responsible because Wilner's firm placed Farah's name on the complaints (ROR:18). Now, in its Initial Brief, the Bar relies on two sentences from federal cases from Delaware and Iowa in support of that proposition (IB 30). Those two nonbinding cases are distinguishable, and not only because the cases evaluate lawyers' behavior in a different, federal Rule 11 context.

The Iowa case holds, in pertinent part, that it was appropriate to award partial attorneys' fees as a sanction under Rule 11 against a party, a law firm, and all attorneys who were "directly involved" because they filed and advocated for a flawed motion. *Ideal Instruments, Inc. v. Rivard Instruments,*

¹ It is ironic that the Bar cites language from *In re Engle Cases*, 767 F.3d 1082, 1087 (11th Cir. 2014) (see IB 28). The opinion in *In re Engle Cases* is critical of Mr. Wilner; it references Wilner's name over 100 times. Mr. Farah's name appears nowhere, not even in the very long list of attorneys associated with the cases (Eddie Farah's name is listed there).

Inc., 243 F.R.D. 322, 348 (N.D. Iowa 2007). The Bar quotes only a footnote from that opinion, which states that the Iowa court would not overturn the sanction against local counsel on the grounds that local counsel did not physically sign the pleadings (which were electronically filed). *Id.* at 348 n.6. That opinion does not address the extent of involvement by local counsel, but one must assume that, unlike Farah, local counsel in *Ideal Instruments, Inc.* appeared in court regularly. That is a significant benefit of having local counsel.

As for the Delaware case, *Vehicle Operation Techs. LLC v. Am. Honda Motor Co. Inc.*, 67 F. Supp. 3d 637 (D. Del. 2014), the court sanctioned *pro hac vice* attorneys who joined the litigation after the original complaint was filed because they “later advocated for it.” The *pro hac vice* attorneys accepted the case after the Rule 11 motion was filed and argued at a minimum of two hearings, including the Rule 11 hearing. *Id.* at 654. Such analysis would be more relevant to the Lieff Cabraser or Motley Rice firms had they been accused of Bar violations, since both firms joined the litigation after the complaints were filed and advocated in favor of them.²

² One must assume the Bar fully accepted the Special Master’s conclusions that Lieff Cabraser and Motley Rice did not violate Rule 11.

The Delaware case represents sound Rule 11 analysis. Rule 11 states that every pleading shall be signed by at least one attorney. Fed. R. Civ. P. 11(a). It further states that “[b]y presenting to the court a pleading . . . — whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies” information within the pleading. Fed. R. Civ. P. 11(b). The Delaware case does not apply to Farah because he did not sign, file, or submit a pleading. Nor did he advocate for a pleading in court, since he appeared only once (in December 2016) to apologize to the District Court for the logistical difficulties which arose during the *Engle* progeny litigation (T:123-24).

The Bar erroneously asserts that Farah’s final hearing testimony about when he learned his name was on the complaints filed by Wilner is contrary to his prior statements (IB 29). The Farah & Farah interrogatory response to the Special Master, prepared in 2016, simply states that Farah & Farah was listed as counsel of record as of the date Wilner filed complaints (TFB-Ex. 7, pg. 8). That response in no way suggests Farah knew his name was listed on the complaints on the date they were filed. It shows at most that Farah knew at the time he put forth the interrogatory response that he was listed on the papers.

Regardless, the issue is of little importance because Farah did not sign a single pleading. The Iowa case, *Ideal Instruments, Inc.*, cites United States Supreme Court language which is more instructive than what the Bar cites in its brief: “[T]he purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility.” *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). The Supreme Court continued:

[J]ust as the court expects the signer personally—and not some nameless person within his law firm—to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally—and not his law firm—its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a “team effort” but in the last analysis *yours alone*, is precisely the point of Rule 11.

Id. at 126–27 (emphasis in original). The Bar ignores this fundamental purpose of Rule 11. The Bar simply cannot avoid the fact that Farah never signed (or filed, submitted, or advocated for) a pleading filed by Wilner.

Contrary to the Bar’s assertion, Farah is not trying to have it both ways. He and his firm had non-litigation responsibilities in connection with the *Engle* cases which entitled his firm to compensation equal to Wilner not because Farah’s name was arbitrarily typed under the lawyer who actually signed each complaint. Farah’s responsibilities were unconnected to the litigation

except for his role in evaluating the 163 cases Wilner took possession of, filed, and for which Wilner advocated. As the Referee correctly found, “Mr. Farah did not play any role in the conduct that drew the Court’s ire, other than his firm originating about 4% of the cases” (ROR:3). Eventually, renowned firms Lieff Cabraser and Motley Rice, which had significant experience in large-scale mass tort litigation, joined in a direct role after educating themselves about the merits and status of the litigation. As the Referee correctly concluded, the evidence established that Farah’s reliance on Wilner and the other firms was reasonable (ROR:18).

Because the Bar failed to conduct any meaningful investigation, despite the District Court’s instructions, the Bar could not and did not present clear and convincing evidence that Farah was less than diligent regarding the relatively few cases originated by his firm that the Special Master deemed flawed.³ The Referee found: “The Florida Bar did not prove that Mr. Farah was personally less than diligent in evaluating the cases before associating with Mr. Wilner, or otherwise responsible for the filing or advocacy of the remaining 12 (of 163) cases” (ROR:19-20).

³ The District Court often used the term “Counsel” in its Opinion and Order, making it unclear exactly who was being criticized. (See, e.g., TFB-Ex. 2, pg. 63, 65-66, 85.) It was evident, however, that Wilner’s conduct was the focus of the District Court’s findings. (See, e.g., TFB-Ex. 2, pg. 11 n.6, 21-25, 29, 37-39, 101, 125-129.)

Farah's role in the overall plaintiff's effort was not *de minimis*. Contrary to the Bar's assertion, he does not now claim it to be (see IB 31). The unrefuted facts established that Farah provided considerable value centering on providing substantial personnel and office support, as well as his individual work to further compensation for deserving plaintiffs from the *Engle* Trust Fund (ROR:18). The large majority of clients were compensated, though that was not the basis for the Referee's conclusion that Farah did not violate Bar rules. Further, the fee splitting arrangement was proportional to the services Farah & Farah provided, and Wilner never asserted otherwise.

It is highly significant that the same District Court that referred this matter to the Bar for investigation approved the ultimate equal allocation of fees between Mr. Wilner's firm and Farah & Farah, after imposing a substantial penalty. The District Court was not concerned about the mechanics of the fee arrangement between Mr. Wilner and Farah & Farah.

II. The Referee Did Not Err in Finding the District Court's Records Were Insufficient to Establish the Rule Violations Charged by the Bar.

The District Court's Opinion and Order expressly contemplated an investigation by the Bar. (TFB-Ex. 2, pg.147.) The Referee observed, however, that rather than independently investigating Farah's alleged

conduct, the Bar “decided to cut corners and simply accept the existing investigatory materials from the Special Master for its own purposes.” (ROR:16.) Apparently, that finding touched a nerve. The Bar spends several pages of its brief attempting to defend its decision not to investigate, without pausing to articulate any plausible basis for concluding that no competent substantial evidence supports the Referee’s finding that the Bar failed to prove the violations charged in its Complaint. (IB 33-37.)⁴

The Bar emphasizes the complexity of the *Engle* litigation and complains that the Referee “substitut[ed] his own judgment” for that of the District Court, as if the Referee were an appellate court reviewing the findings of a trier of fact and bound to defer to them. (IB 36.) But this proceeding is not an appeal from the District Court’s decision. The Referee was entitled to credit the testimony of Farah, the Bar’s sole witness. See *Thomas*, 582 So. 2d at 1178.

Significantly, the Bar does not contend that the District Court’s decision has any preclusive effect in this proceeding under the doctrines of res judicata or collateral estoppel. Any such contention would be meritless, since the Bar was not a party to the *Engle* cases and the District Court did not

⁴ In part, the Bar attempts to defend its decision not to depose Farah. (IB 34-36.) It did not depose anyone else either.

decide whether Farah violated Rules 4-1.3, 4-1.4(a), and 4-1.16. See, e.g., *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (per curiam) (explaining that res judicata requires “identity of persons and parties to the action” and that “collateral estoppel bars relitigation of the *same issues* between the *same parties*” (emphasis added)); see also *S. River Watershed Alliance, Inc. v. Dekalb Cnty.*, 69 F.4th 809, 815 n.1 (11th Cir. 2023) (observing that res judicata requires that “both cases must involve the same parties or their privies”); *Grosz v. City of Miami Beach*, 82 F.3d 1005, 1006 (11th Cir. 1996) (“Collateral estoppel can foreclose relitigation of an issue of fact or law where that *identical* issue has been fully litigated and decided in a prior suit.” (emphasis in original)).

Instead, the Bar appears to assume that the Referee was required to credit hearsay statements by the District Court regarding Farah’s alleged violations of Rule 11 and 28 U.S.C. § 1927—and to infer from those statements that Farah also committed the rule violations charged in the Bar’s Complaint, an issue the District Court did not decide. See *Houston v. City of Tampa Firefighters & Police Officers’ Pension Fund Bd. of Tr.*, 303 So. 3d 233, 243-44 (Fla. 2d DCA 2020) (concluding that a federal judge’s finding at a sentencing hearing in a prior proceeding was hearsay); *BDO Siedman, LLP v. Banco Espirito Santo Int’l*, 38 So. 3d 874, 880 (Fla. 3d DCA 2010) (“A

court judgment is hearsay ‘to the extent that it is offered to prove the truth of the matters asserted in the judgment.’” (quoting *United States v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007)). The Bar cites no authority for such a novel proposition.

Florida law is to the contrary. As the Fifth District aptly recognized in another context, a statement from a prior court’s decision “cannot substitute for proof of the fact.” *Rubrecht v. Cone Distributing, Inc.*, 95 So. 3d 950, 959 (Fla. 5th DCA 2012). That, presumably, is one of the reasons the District Court expected the Bar to undertake an investigation.

The sole authority cited by the Bar in support of its position is *Florida Bar v. Committe*, 136 So. 3d 1111 (Fla. 2014) (per curiam). That case is inapposite. In *Committe*, the referee concluded that claims asserted by the lawyer in the underlying litigation were not frivolous because the allegations of the lawyer’s complaint were legally sufficient to state causes of action. *Id.* at 1115. The referee in that case ignored the central question: whether, as the circuit court had found, those allegations were unsupported by any evidence. *Id.* This Court therefore concluded in *Committe* that the referee’s factual findings were not sufficient to support its recommendation as to guilt. *Id.* at 1114-15. The Court did not say the referee was required to credit the circuit court’s hearsay statements, or to draw from those statements the

further inference that the lawyer had violated the Rules Regulating the Florida Bar.

Finally, the Bar fixates on the Referee's passing remark that the "burden of proof differed" between the federal sanctions proceeding and the trial before the Referee. (ROR:16; IB 33.) The Bar insists that statement is erroneous because the District Court applied a clear-and-convincing-evidence standard to the question whether Farah violated 28 U.S.C. § 1927. (IB 33.) But that question was not before the Referee and is not before this Court. And the Bar does not assert that the District Court found by clear and convincing evidence that Farah committed the rule violations charged in its Complaint.

The District Court referred the matter to the Bar for an independent investigation, but the Referee found none occurred. (ROR:16.) The Bar points to no evidence in the record that refutes this critical finding. Nothing in the Bar's attempted defense of its failure to investigate or meet its burden warrants overturning any of the Referee's findings.

III. Despite the Bar's Position on Appeal That Neither Farah nor Wilner Obtained "Valid Written Contingency Fee Agreements in the Vast Majority of Cases" and Did Not Seek Court Approval of Their Fee Splitting Arrangement, the Bar's Contention That This Court Can Now Find Respondent Violated Rule 4-1.5(F)(2) and Rule 4-1.5(F)(4)(D)(iii) Should be Rejected, Because Those Issues Were Not Adequately Presented to the Referee, and the Facts Do Not Support Such a Contention. (Restated)

As this Court explained in *Florida Bar v. Lord*, 433 So. 2d 983, 986 (Fla. 1983), Bar discipline must serve three purposes:

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, *the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.*

The Referee properly considered each of these purposes when it determined Farah was not guilty of any of the offenses for which he was charged and should not be subjected to discipline. Further, none of those purposes would be served if Farah were found to have violated the rules not charged in the Bar's Complaint.

As the party challenging the Referee's findings of fact and recommendations as to guilt or innocence, the Bar is required to show to this Court that no record evidence supported those findings, or that the record

evidence “clearly contradicts the conclusions.” *Fla. Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019). The Bar failed to meet that burden.

Having failed to prove its case before the Referee, the Bar now changes tactics by asking this Court to find Farah violated other rules for which he was never formally charged. This Court should decline to do that.

One underlying standard which the Bar’s brief did not address was whether Farah was being provided appropriate due process, to ensure that the proceedings against him have been conducted consistent with principles of fundamental fairness. The Bar now asserts alleged violations by Respondent of Rules 4-1.5(f)(2) and Rule 4-1.5(f)(4)(D)(iii), Rules Regulating the Florida Bar.

The Bar candidly admits those alleged Rules violations were “not charged in the complaint” (IB 38), but argues that pursuant to *Florida Bar v. Fredericks*, 731 So. 2d 1249, 1253 (Fla. 1999), an attorney “*could* be found guilty of violating a rule not specifically charged in the formal complaint where the complaint alleged the actual conduct which formed the basis of the violation.”⁵ (Emphasis added.) The Bar’s cavalier citation of *Fredericks*

⁵ This tactic by the Bar was the subject of Farah’s Motion to Strike Portions of the Bar’s “Notice of Intent to Seek Review of Report of Referee,” which this Court denied on February 20, 2024, without prejudice to Farah raising these arguments in his Answer Brief.

should not be taken by this Court as requiring, or even permitting, the Bar to change course after its unsuccessful action before the Referee.

The Bar should not be allowed to pursue new charges based on information that has been at their disposal since at least October 2017. Farah should be able to obtain closure on this matter.

The Bar incorrectly contends that because its Complaint contained a barebones statement that Farah (and Wilner) had not obtained required written contingency fee agreements for “many clients” (¶¶ 19, 20), and had agreed to “share the significant labor and expense” to prosecute *Engle* cases (¶ 8), that was somehow sufficient to put Farah on notice that these matters would be fair game before this Court, even though the new allegations were not raised before the final hearing, or proven.

The Bar glosses over a significant limitation in the *Fredericks* opinion, which was that a lawyer “could be found guilty” of rule violations which had not been expressly charged. That did not mean that a lawyer can (or should) always be charged with new accusations after the lawyer was found not guilty by the Referee, especially when the Bar was aware of the potential issues for many years before the final hearing.

Although *Fredericks* has been cited in subsequent opinions, it is not often cited for the proposition now advanced by the Bar. In *Florida Bar v.*

Strems, 357 So. 3d 77 (Fla. 2022), this Court believed the lawyer's non-charged conduct was "clearly within the scope of the Bar's accusations" and the attorney was aware of "the nature and extent of the charges pending against [him]." The instant facts and circumstances are materially different. In *Strems*, the referee had already found the attorney guilty of professional misconduct and recommended a two-year suspension based on the stated charges. A new charge of violating Rule 4-3.1 (Meritorious Claims and Contentions) was only added shortly before the hearing, alleging the lawyer had brought a frivolous case. This Court approved the Referee's factual findings, with one exception, but opted to disbar the lawyer. The factual basis for the Bar's newly pled Rule 4-3.1 violation was "clearly within" the scope of the Bar's other allegations against *Strems*, and this Court approved the referee's finding of guilt on the new charge.

Strems cited *Florida Bar v. Nowacki*, 697 So. 2d 828, 832 (Fla. 1997), where the referee and this Court rejected the lawyer's arguments that the Bar's complaint did not provide "sufficient notice of the specific instances of misconduct" and did not "specifically charge" the lawyer with various instances of misconduct. This Court concluded that the newly asserted charges were "clearly within the scope of the Bar's accusations and [the

lawyer] was clearly notified of the nature and extent of the charges pending against her.” *Id.*

Both cases are distinguishable from the case at bar. *Nowacki* stated that a referee may include information not specifically charged in the Bar’s complaint if that information was “within the scope of the Bar’s accusations.” Here, after opening an inquiry in 2017, the Bar asks this Court to find guilt for uncharged violations.

There is a good underlying reason why *Fredericks* should not be the general rule, nor applied in this case. This reason was stated by Senior Justice Shaw in *Fla. Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003). Recognizing this Court’s opinions in *Fredericks*, *supra*, and *Florida Bar v. Rubin*, 709 So. 2d 1361, 1363 (Fla. 1998), Justice Shaw’s dissent in *Rapoport* focused on the inherent problem with allowing this kind of freeform proceeding, while noting one of the central issues in *Rapoport* was whether the referee had abused his discretion by refusing to grant a continuance. Justice Shaw continued:

The majority opinion concludes that Rapoport is not entitled to relief because he received “both notice and an opportunity to be heard before *this* Court.” I do not believe that this constitutes a sufficient remedy. As noted above, Rapoport was not given an opportunity to submit disputed factual issues before the referee, and there are no provisions which permit

him to present such disputed factual issues before this Court.

845 So. 2d at 879-80 (emphasis in original).

Even though Bar counsel referred to these non-charged contentions during the hearing before the Referee, it is fundamentally unfair to allow uncharged Rule violations to form the basis of potential findings of guilt by this Court without Farah having a meaningful opportunity to respond.

The Bar's central argument for discipline rests on the same faulty foundation it has taken throughout these proceedings. The Bar contends that because Wilner added Farah's name to the pleadings, Farah thereby became separately and independently responsible for all of Wilner's actions.

The Bar begins this argument by suggesting the “first order of business” for the lawyers should have been to “obtain written contingency fee agreements,” still based on the premise that Farah was responsible for all of Wilner’s filings (IB 39). Yet the Referee specifically found that as to the 163 clients generated by Farah’s firm, those clients had signed contingency fee agreements and statements of client's rights (see ROR:6; R-Ex. 3). The Referee also found those fee agreements “notified clients about the possibility of partnership with outside attorneys in a paragraph entitled ‘Associate Counsel,’” which covered both Wilner's involvement in the case and firms like Lieff Cabraser and Motley Rice. (*Id.*)

The Bar argues Farah failed to obtain valid written contingency fee agreements with all of Wilner's clients, which constituted a purported lack of diligence and lack of client communication (IB 39). This is a classic example of improper bootstrapping. On appeal, the Bar acknowledged Farah had "obtained some contingency fee agreements before filing suit in 163 cases originating from his office" (despite the Referee's factual finding, as set out above). The Bar now argues some of those agreements were made irrelevant because they were terminated by Farah before filing a complaint and were not revived through a writing signed by the client (IB 39). However, this argument was also contrary to, and rebutted by, the Referee's factual finding that Farah & Farah used reactivation letters to revive the representations: "Most cases were revived with written authorization, though some were revived after verbal communication with a client" (ROR:6).

The Bar engages in additional argument which was expressly not within the four corners of its Complaint that Farah had inappropriately terminated potential client cases which were not found to be viable before the *Engle* filing deadline passed (IB 39-40).⁶ The Bar now argues that

⁶ Paragraph 16 of the Bar's Complaint alleged Farah had terminated 90 percent of his prior client relationships, but that contention was raised in the context of whether he could only re-instate (and file) those cases after obtaining "permission" from the client.

Farah's decision-making subjects him to discipline because he allegedly gave those potential clients "insufficient time to obtain new counsel before the January 11, 2008 deadline to file suit" (IB 40). The irony of this argument is that while the Bar claims Farah was not diligent because his firm considered but rejected potential tobacco claims before the filing deadline, in the same breath Farah is criticized for having advanced frivolous, non-viable claims.

The Bar continually asks this Court to review the underlying facts in a vacuum, ignoring the fact that the demands and deadlines applicable to this post-*Engle* litigation constituted a unique situation. Lawyers were faced with a hard deadline to file or potentially risk the loss of the clients' rights. As the Referee correctly found, Farah could not be faulted under these circumstances.

As referenced above, the Bar's central and repeated contention is that Wilner's mere placement of Farah's name on the papers meant Farah should have obtained separate contingency fee agreements with those Wilner-generated clients (IB 40). However, the Referee correctly found:

Mr. Farah testified he did not know his name would appear on the complaints, and the Florida Bar did not refute that testimony.

(ROR:8.)

The Referee's Report pointed out that consistent with Ethics Opinion 72-36 (Reconsidered), filing a case as a protective measure for the client, even if it may have been "far from perfect", would not be unethical under such circumstances (see R-Ex. 1). In any event, as the Referee found, those "far from perfect" cases were virtually all drawn from the group of potential clients Wilner brought to the effort, not the 163 Farah & Farah clients.

The Bar relies on this Court's Opinion in *Florida Bar v. Rood*, 633 So. 2d 7 (Fla. 1994), where the Court found a lawyer had violated Rule 4-1.5(f)(2) because he failed to reduce a fee agreement to writing, even though he claimed the failure was due to negligence by another attorney. Here, based on the evidence presented before him, the Referee found the Farah & Farah clients had entered into appropriate contingency fee agreements.

The Bar contends that in *Rood*, this Court explained three reasons contingency fee agreements should be in writing: (1) to ensure the public is informed about the fees they will be obligated to pay; (2) to minimize disputes regarding fees; and (3) to ensure lawyers are paid in proportion to the services they render." In this case, none of those factors are implicated in any way adverse to Farah.

As the Referee found, the Farah & Farah clients were informed about the fees they would be charged, and about other key events in the post-

Engle litigation, as well as the fact that additional counsel might be associated. The Referee notably found there had been no complaints or disputes by any of the tobacco clients about Farah & Farah's fees, and in light of the subsequent action by the District Court and the global settlement reached between the parties (which included a huge reduction in their fees), there can be no argument that the lawyers were not paid in proportion to the value of services rendered. *Rood* is inapplicable here.

The Bar further argues (IB 41) that Farah should have sought approval of his fee sharing arrangement with Wilner at some point before the District Court approved the distribution of fees to the plaintiffs' lawyers. The Bar contends that Farah's firm was not acting simply as a referring law firm but was active in the litigation. As the Referee found, it was undisputed that except for the one instance after the Special Master's Report was issued, when Mr. Farah appeared in Federal District Court to express remorse and apologize, Farah never participated in any of the hearings, discovery or otherwise.

That is not to say Farah & Farah's financial contributions and "back office" activity in the *Engle* litigation did not provide value for those clients. As the Referee found, "Farah & Farah also assisted with the litigation effort by communicating with clients, particularly as it related to gathering personal

histories, medical records, and other important information. That information would then be forwarded to Mr. Wilner's firm for use in the ongoing litigation” (ROR:8-9). The number of Farah clients who obtained compensation through the Trust Fund or the global settlement is itself proof of the value of Farah’s efforts.

The fact that the Bar never informally criticized Farah, or formally charged him with purported violations of Rule 4-1.5(f)(4)(D)(iii) highlights the inherent weakness in the Bar's position. The Referee found it highly significant that the Bar chose not to undertake any investigation of the underlying facts of this case. Instead, it simply relied upon the Special Master’s Report and the Order and Opinion of the Federal District Court, even though the District Court’s own referral specifically contemplated that the Bar would conduct an independent investigation. The Referee noted that Farah had expressed his concerns about deficiencies in the Opinion and Order of this Court and the Special Master’s underlying Report. The Referee found that “notably, the Special Master did not interview or depose Mr. Farah or any other member of his firm” (ROR:12). Neither did the Bar.

The Bar relies upon the Second District’s opinion in *Harmon Parker, P.A. v. Santek Mgmt., LLC*, 311 So. 3d 213, 215 (Fla. 2d DCA 2020), where the court contemplated those attorneys would “accept substantially equal

active participation in providing’ of legal services.” In the instant case, Wilner and Farah had divided responsibilities whereby Farah contributed substantial financial backing and “back room” support, employing over 100 staff persons to help manage the collection and dissemination of records, while based on his tobacco experience, Wilner handled the litigation, discovery, motion practice and other aspects of the litigation. Those facts bely any claim that there was not “substantially equal active participation” by the lawyers. The Bar overlooks that the District Court ultimately approved the global settlement, which included the distribution of the fees and percentages to each involved firm, including Farah & Farah.⁷

While the Bar may have learned for the first time at the final hearing that Farah did not authorize his name to be placed on the pleadings (IB 42), that information was available to the Bar at any time had they asked Farah or otherwise investigated. Nevertheless, the Bar’s argument that Farah was but a bit player in the extraordinary effort against the tobacco companies and not entitled to the compensation approved by the District Court is unsupported by the record.

⁷ Farah & Farah ultimately received less than 10% of the funds set aside for plaintiffs’ counsel.

For these reasons, there is no basis to find the Referee erred in failing to consider purported Rules violations which the Bar never previously pled and never proved against Farah.

IV. The Referee Correctly Concluded That Farah Did Not Violate Rules 4-1.3 (Diligence), 4-1.4(a) (Communication), and 4-1.16 (Declining or Terminating Representation). (Restated)

These issues were charged by the Bar and tried before the Referee. The Bar adheres to its flawed position that because Wilner chose to put Farah's name on the pleadings, Mr. Farah became fully responsible for all 4,432 claims Wilner filed, as well as Wilner's subsequent action or inaction (see IB 42). The Bar's argument ignores the fact that Farah never actually signed the papers. The Referee correctly found that Farah acted with reasonable diligence before and after associating with Wilner's firm.

The Bar erroneously tries to create vicarious ethical responsibility on Farah's part for Wilner's deficiencies in handling the tobacco litigation. The Bar ignores the comment to Rule 4-5.1; although the text directly deals with intra-firm lawyer responsibility, it is illustrative here:

Apart from this rule and rule 4-8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, shareholder, member of a limited liability company, officer, director, manager, associate, or subordinate.

The Special Master, the District Court, and the Bar have all recognized that Farah's culpability was significantly less than Wilner's. Nevertheless, the Bar takes a broad-brush approach by attempting to attribute any and all of Wilner's shortcomings to Farah. The Referee correctly saw through the Bar's attempt, finding as follows:

The Special Master's criticism of [Farah's] conduct, which was later adopted by The Florida Bar in these proceedings, is traced to the arbitrary fact that another lawyer [i.e., Wilner] put Mr. Farah's name, rather than the name of his brother or another Farah & Farah attorney, on thousands of complaints.

(ROR:17.)

Rule 11 provides that an attorney certifies "a pleading, written motion, or other paper" by "signing, filing, submitting, or later advocating" the document. Fed. R. Civ. P. 11(b). The U.S. Supreme Court has stated that "[t]he essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 546 (1991). The Bar relied solely on the District Court's Rule 11 conclusions in bringing disciplinary proceedings against Farah. But those conclusions do not necessarily equate to one or more Bar rule violations, which is why the Court referred this matter to the Bar to conduct an investigation.

Rule 11 recognizes the importance of the signature requirement because it establishes that only the person *responsible* for filing or advocating the offending paper should be sanctioned. Fed. R. Civ. P. 11(c)(1). According to the 1993 Advisory Committee Note, “[t]he person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation.”

The importance of identifying the person actually responsible for the filing makes good sense, particularly in these circumstances where attorneys had divided responsibilities. Someone must have primary responsibility for the court filing, and Rule 11 places that responsibility upon the signor and anyone who later advocates for the position.⁸ Farah was not the signor and never “advocated” for the position for which he is now being criticized.

The Bar continues to argue that Farah is strictly liable because he “signed” the *Engle* complaints and other papers. The Bar’s contention that Farah signed each one of the complaints, or that he was a “cosigner,” is mistaken. There is no dispute that the subject complaints and other court

⁸ The 2014 *Engle* opinion made clear that the Eleventh Circuit shares this view. 767 F.3d 1082 (11th Cir. 2014). While the Opinion and Order had suggested that the Eleventh Circuit’s 2014 opinion somehow addressed Farah’s role, Judge Tjoflat’s opinion never mentions Farah or Farah & Farah.

papers were drafted, filed, and signed by the Wilner Firm. Farah did not sign the subsequent filings by Wilner referenced by the District Court's Opinion and Order addressing the viability *vel non* of the remaining cases. The first document was signed by Wilner; the second was signed by the lawyers with the Lieff Cabraser firm.

The issue of when or whether a lawyer has "signed" a document is still in flux, especially in the age of electronic filing. In a recent opinion, *In re Autozoners, LLC*, No. 22-0719, 2024 WL 1819655 (Tex. Apr. 26, 2024), the Supreme Court of Texas was asked to address the legal significance of a lawyer's signature block being placed on a court filing, without any other indicia of their role in the litigation.

In *In re AutoZoners*, two lawyers who were not members of the Texas Bar wanted to appear for the defendant in pending Texas litigation involving age discrimination allegations.

The defendant retained Texas counsel, whose "/s/" electronic signature was placed on the answer, which also contained the signature blocks for the two out-of-state lawyers, without any "wet ink" or symbol of an electronic signature, along with the statement that their motion for *pro hac vice* admission "will be forthcoming."

Four days later, a motion was filed to admit the two out-of-state lawyers on a *pro hac* basis, which was opposed by the plaintiff, who claimed the out-of-state lawyers must have prepared the answer before they had been granted admission. At the subsequent hearing, the two out-of-state lawyers told the court that while they had “reviewed and provided input on the answer,” they denied having prepared or filed it.

The trial judge denied their *pro hac* admission, stating she was “offended” because the lawyers were signing documents before being admitted.

Autozoners sought mandamus review from the Texas Supreme Court, arguing that neither lawyer had signed the answer, which was electronically signed by local Texas counsel, and the lawyers should have been granted *pro hac* admission. The Supreme Court of Texas agreed, concluding that the lawyers had not engaged in the unauthorized practice of law “merely by listing their names below [local counsel’s] on the signature block...” Despite the speculation of plaintiff’s counsel, there was no evidence that either lawyer had prepared the answer.

This opinion shows Wilner, by placing Farah’s signature block on the papers without any “wet ink” or electronic signature symbol, did not establish

Farah was “signing” the papers. In *Autozoners*, the mere placement of the signature blocks did not constitute “signing” the paper in question.

In the instant case, Farah testified he did not initially know his name was being put on the papers by Wilner (T:51-52), while in *Autozoners* the two out-of-state lawyers were actually announcing their involvement, pending their *pro hac* admission. This Court should give appropriate weight to the same reasoning applied by the Supreme Court of Texas.

The District Court described Wilner as “substantially more responsible for what happened in the federal *Engle* litigation” yet came to the conclusion that Wilner and Farah should be sanctioned equally (TFB-Ex. 2, pg. 144 n.78). However, the Court’s analysis seemed driven by the mistaken assertions that Farah had “signed” the complaints and other suspect court filings. When they are excluded, any reasons for imposing Bar sanctions against Farah would be based solely on actions taken by others.

As noted above, the Bar did not independently investigate this matter. It simply relied on the Special Master’s Report and the District Court’s Opinion and Order. In questioning the Bar’s apparent failure to investigate, the Referee found this Court’s opinion in *Florida Bar v. Rubin*, 362 So. 2d 12, 16 (Fla. 1978) significant. *Rubin* held:

The Bar has consistently demanded that attorneys turn “square corners” in the conduct of their affairs. An accused attorney has the right to demand no less of the Bar when it musters its resources to prosecute attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys and that we will hold the Bar accountable for any failure to do so. 362 So. 2d at 16.

(ROR:16.) See also *Fla. Bar v. Kane*, 202 So. 3d 11, 19 (Fla. 2016).

With that principle in mind, the Referee succinctly pointed to the flaws resulting from the Bar’s failure to actually investigate the underlying facts. The refusal to even interview Farah was unreasonable, especially because the Special Master had expressly declined to do so (claiming no useful purpose would be served).

As the Referee found, “[w]ith all the resources at their disposal, the Bar decided to cut corners and simply accept the existing investigatory materials from the Special Master for its own purposes. The Bar did not undertake any independent investigation as recommended by the Special Master and ordered by the District Court.” The Court gave the Bar a clear directive to investigate on October 18, 2017. Paragraph 2 of the adjudicatory portion of the Opinion and Order stated: “The Court refers the matters discussed herein to the Florida Bar for an investigation into” various potential professional rule violations. (TFB-Ex. 2, pg. 147.) The Bar conducted no investigation and

opted not to interview or depose Farah (or any other Farah & Farah employees).

At the final hearing, the Bar called only one witness, Farah, and chose not to call any of the thousands of people (clients, attorneys, law firm personnel, court personnel, etc.) involved in the litigation or related investigation. The Referee found Mr. Farah's testimony credible (ROR:16-17), and the Bar offered nothing in rebuttal.

Based on the Referee's finding establishing Farah's credibility, he correctly concluded that the Special Master's criticism of his conduct (which the Bar adopted *in toto*) "is traced to the arbitrary fact" that Wilner placed Farah's name on papers, without a "wet ink" signature, or a "/s/" denoting the symbol for an electronic signature or otherwise (as recognized by Rule 2.515(c)(1)(A-D), Florida Rules of General Practice and Judicial Administration) (see ROR:17).

This Court must consider the Bar's complete reliance on the accuracy of the Special Master's Report when weighing whether to overrule the findings and sound judgment of the Referee. The Bar bears responsibility for its lack of action and its failure to "square the corners" while processing this disciplinary matter.

The Bar's attempt to justify discipline against Farah based on a 2014 opinion written by the Eleventh Circuit Court of Appeals rejecting arguments then made by Wilner about the propriety of filing "placeholder actions" is unavailing. That opinion never once mentioned Farah. See *In re Engle Cases*, 767 F.3d 1082 (11th Cir. 2014). The Referee certainly committed no legal error.

The Referee correctly rejected the Bar's claim, now renewed on appeal, that Farah did not act with reasonable diligence and did not reasonably consult with clients when the initial *Engle* actions were filed (IB 45). Based on the evidence presented, the Referee found Farah had conducted appropriate due diligence concerning the 163 clients which his firm had generated and for which suits were ultimately filed (ROR:19-20). The Referee specifically found that if any lack of reasonable diligence could be found from the evidence presented, "it was the diligence owed to the District Court by Mr. Wilner. Mr. Farah provided reasonably diligent representation to his clients in his limited role. His firm's intake process was thorough. His firm compiled a group of prosecutable cases, with just a few exceptions" (ROR:17).

Farah did not engage in reckless conduct, as the Bar accuses. In fact, Farah acted responsibly, as the Referee found. The Referee also recognized

that Farah & Farah's evaluation of "viable" tobacco cases was subject to changing standards and an evolving body of law during the one-year period that this Court gave tobacco plaintiffs to file lawsuits after the *Engle* class action judgment was vacated (ROR:6).

With the benefit of almost two decades of hindsight, it is now easy for the Bar to argue it was reckless for Wilner to have filed the cases he did, or to otherwise second-guess Farah's inactions (for which he had already expressed remorse directly to the U.S. District Court Judges). It is the lawyer's intent and actions when the occurrences happened that are dispositive when considering whether discipline should be imposed. The underlying goal was not to abandon any potential tobacco claimant.

The Bar criticizes Farah because, after the *Engle* filing deadline, he ostensibly had "multiple years to vet these cases" (IB 45). However, he was not responsible for vetting the Wilner-generated clients, and the Referee found, based on sufficient evidence and testimony, the 163 Farah & Farah clients had been properly vetted (ROR:19-20). In any event, the subsequent vetting process was undertaken, and did not affect the assessment of Farah's good faith at the time the suits were filed.

The Bar repeatedly states that many of the complaints filed by Wilner were "meritless." That contention ignores that it was entirely reasonable for

Farah to associate with Wilner, as the Referee found (ROR:18). Wilner was one of the most experienced tobacco lawyers at the time, and Farah's decision and reliance on the viability of the claims of the clients generated by Wilner could not be deemed as a lack of diligence (see ROR:5, 17-18). Farah's engagement letter informed the clients about the possibility of associating additional counsel (R-Ex. 3, pg. 3).

Wilner and Farah's subsequent decision to associate experienced mass tort firms Lieff Cabraser and Motley Rice as additional counsel was an example of diligence on behalf of their clients (ROR:17-18).

Farah's diligence was ultimately established by the fact that of the 163 clients his firm originated, 141 of them received compensation, either through the claims process of the *Engle* Trust Fund or the subsequent settlement of the *Engle* litigation. Of the 22 cases which did not result in compensation to the clients, the Referee found ten had been dismissed because the clients did not return court-ordered questionnaires, not because the filings themselves were flawed (ROR:19).

Based on all these considerations, the Referee correctly concluded that the Bar failed to meet its burden of proving Farah had not been diligent in evaluating *Engle* tobacco cases before or after associating with Wilner.

The Referee correctly placed great weight on the fact that no client complained about Farah's conduct or claimed financial harm (ROR:20).

The Bar's argument suggests that Farah's "initial deference" to Wilner's expertise in tobacco litigation may have been appropriate, but then criticizes Farah because he continued to defer to Wilner's handling of the litigation (see IB 47). The fact that the District Court became suspicious about the accuracy of Wilner's representations and assurances that the remaining pending claims were viable cannot be attributed to Farah, because he never made any such representations.

It is noteworthy that the Bar does not accept Farah's un rebutted testimony before the Referee describing his efforts on behalf of tobacco clients. When describing Farah's testimony (who was the only witness presented by the Bar), the Bar contends that Farah "claimed" he and his firm hired and managed over 100 people to aid in the litigation. The Bar did nothing to rebut Farah's testimony, so its criticism must be rejected. And the Bar ignores the principle that the facts found by the Referee should be viewed by this Court in the light most favorable to affirmance.

The Bar claims it was unreasonable for the Referee to have left "unexplained" in his Report why it was "both reasonable and necessary" for Wilner to be in possession of the physical files of the 163 Farah clients (ROR:

21; IB 49). The reason is obvious and logical, and did not require detailed explanation. It was reasonable for Wilner to have the physical files because he was responsible for handling case management, discovery, and general trial duties. Farah's assumption of substantial back office and financial support duties as part of the division of responsibility (TFB-Ex. 1, pg. 72) did not constitute some type of "abdication."

The Bar criticized Farah for having delayed in bringing on Leiff Cabraser and Motley Rice as additional counsel (IB 50). The cases had been stayed for two years while threshold legal issues were appealed. When the cases were reinitiated and it became clear the Court was displeased with the efficiency of the litigation, plaintiffs' counsel brought on two firms with expertise in mass torts to obtain the best result for the clients. The Bar repeatedly takes the role of Monday morning quarterback, first asserting that Farah should have taken a more active role at the outset, and then arguing he was culpable for not identifying other experienced firms to associate with at some earlier time.

The Bar's contention that Farah's "passive role" operated to the detriment of the overall litigation and the clients (IB 51) lacks any evidentiary support. The harsh criticism Farah received from the District Court was the subject of media publicity, and Farah suffered a substantial financial penalty.

The Referee correctly found none of the three Rule violations which were charged and tried by the Bar, nor any others, had been proven by clear and convincing evidence. The Referee's finding that no further discipline was appropriate should be affirmed.

V. If this Court Reverses the Referee's Decision That the Bar Did Not Meet its Burden in Proving a Rule Violation, Determination of the Appropriate Sanction Is Premature Because There Was No Sanction Hearing.

The Referee correctly concluded that the Bar did not clearly and convincingly prove that Farah committed a Bar violation. Once the Referee found that no disciplinary measure was warranted, there was no purpose in convening the sanction hearing (scheduled to begin 15 days after the final hearing) (ROR:23). The Bar now proposes to omit that crucial step in the process. Should this Honorable Court disagree with the Referee's fact-finding, it should remand the case to the Referee for a sanction hearing.

An attorney is entitled to due process in disciplinary proceedings. *Fla. Bar v. Carricarte*, 733 So. 2d 975, 978–79 (Fla. 1999); see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). With regard to the specific discipline imposed, due process requires that the attorney be permitted to “explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed.” *Fla. Bar v. Cruz*, 490

So .2d 48, 49 (Fla.1986); *see also Fla. Bar v. Fussell*, 179 So. 2d 852, 854 (Fla.1965).

This Court should uphold the Referee's November 1, 2023 decision and end this saga. If the Court decides otherwise, Farah, a 34-year lawyer with no previous disciplinary record, has ample mitigation to present aside from his very limited role in the conduct that drew the District Court's criticism (ROR:3). Due process requires that he be given the opportunity to do so before a specific sanction is determined by the finder of fact.

CONCLUSION

The Referee's Report should be affirmed in its entirety. The Bar failed to carry its burden of establishing that Farah's review of the 163 tobacco cases his firm originated was incomplete or inadequate, or that he failed to obtain sufficient fee agreements and client authorizations.

The Bar completely failed to conduct any investigation into potential charges against Farah, despite the directions from the District Court. If the District Court intended for the Bar to do nothing more than rely on the Rule 11 investigation, it would not have directed the Bar to conduct "an investigation into" Farah's conduct.

The Referee correctly ruled that the Bar did not prove the actual charges against Farah. The Bar cannot now properly attempt to find Farah

guilty of additional rule violations which were never pled by the Bar or raised before the final hearing. Such a procedure flies in the face of a lawyer's fundamental due process rights.

The Referee found in favor of Farah, thereby removing the necessity of a sanction hearing. The Bar's current request that this Court impose any sanction further violates Farah's basic due process rights and Bar rules.

Respectfully submitted this 24th day of May, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2024, a true and correct copy of the foregoing has been electronically filed with the Clerk of Court by utilizing the Florida Courts E-Filing Portal, which will send a notice of electronic filing to the following:

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CERTIFICATE OF FONT AND WORD-COUNT COMPLIANCE

I hereby certify that this Answer Brief complies with the font style and size requirements of Florida Rule of Appellate Procedure 9.045(b) and does not exceed the word count limit requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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