IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

vs.

HAROLD SILVER,
Respondent.
_____/

SUPREME COURT NO. SC00-689
TFB File No. 1999-01,366(8A)

On Review of the
REPORT OF THE REFEREE
Honorable Jack Springstead
Circuit Judge

_____

REPLY BRIEF OF RESPONDENT

_____

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS..... ii

NOTE ON ABBREVIATIONS..... 1

ARGUMENT

I. THE EVIDENCE IS NOT CLEAR AND CONVINCING..... 1

II. THE BAR MAKES MISLEADING ARGUMENTS..... 3

III. ESTABLISHED LAW PRECLUDES THE CONCLUSION REACHED..... 8

IV. THE LEGAL CONCLUSION IS *EX POST FACTO*..... 11

V. THE FINDINGS ARE LEGALLY INSUFFICIENT..... 12

VI. THE COSTS ARE EXCESSIVE AND DISPROPORTIONATE..... 13

CERTIFICATE OF SERVICE..... 14

TABLE OF CITATIONS

Page

FLORIDA SUPREME COURT CASES:

Daniel Mones, P.A. v. Smith
486 So.2d 589 (Fla. 1986)..... 7,9,10,11

Florida Bar v. Neu
597 So.2d 266 (Fla. 1992)..... 2

Florida Bar v. Wagner
212 So.2d 770 (Fla. 1968)..... 3,8,9,13

Goswick v. State
143 So.2d 817 (Fla. 1962)..... 12

State v. Mischler
488 So.2d 523 (Fla. 1986)..... 2

OTHER FLORIDA CASES:

Amacher v. Keel
358 So.2d 889 (Fla. 2nd DCA 1978)..... 11

Berger v. Silverstein
727 So.2d 312 (Fla. 3rd DCA 1999)..... 9,10,11

I.O. v. State
412 So.2d 42 (Fla. 3rd DCA 1982)..... 12

Midtown Realty, Inc. v. Hussain
712 So.2d 1249 (Fla. 5th DCA 1998)..... 10

Sabin v. Butter
522 So.2d 939 (Fla. 3rd DCA 1988) *cause dismissed sub nom* Phoenix Collection, Ltd. v. Butter
531 So.2d 168 (Fla. 1988)..... 11

FLORIDA RULES OF COURT:

Rule 1.090(e), Fla.R.Civ.P..... 8

RULES REGULATING THE FLORIDA BAR

Rule 4-1.15..... 6,9,10,11

Rule 4-1.15(b)..... 4

Rule 4-1.15(c).. 4

NOTE ON ABBREVIATIONS

In the interest of brevity, the following abbreviations are used: BAR = Florida Bar, Complainant; SILVER = Harold Silver, Respondent; CX_:_ = Complainant's Exhibit, with the exhibit number before and the page number after the colon; RX_:_ = Respondent's Exhibit, with the exhibit number before and the page number after the colon; T_:_ = Transcript of Hearing, with the volume number before and the page number after the colon. RR:_ = Report of Referee, page number; IB:_ = Initial Brief of SILVER, with page number after the colon; AB:_ = Answer Brief of BAR, with page number after the colon.

ARGUMENT

I. THE EVIDENCE IS NOT CLEAR AND CONVINCING.

1. In its response to SILVER's first issue, the BAR notably fails to distinguish between a "finding of fact" and a "conclusion of law," citing numerous cases regarding a referee's findings of fact. AB:11. SILVER agrees a referee's findings of fact arrive with a presumption of correctness and the standard which generally accompanies findings of fact on appellate review. Indeed, the facts in this case are virtually undisputed; what has always been disputed is the "spin" the BAR attempts to put on the plain facts.

2. For example, in the proceedings below, SILVER asked the BAR to admit that,

> 1. Throughout the communications among HAROLD SILVER (SILVER), Dr. Owen Osbourne (Osbourne) and Ramadan Hand Institute (Ramadan), there was no statement made by SILVER to Osbourne which was untrue at the time the statement was made. REQUEST FOR ADMISSIONS, June 7, 2000.

SILVER made an identical request regarding any untrue statements to Ramadan. It would appear simple enough; the BAR either knew of an untrue statement or it did not. However, apparently recognizing that its failure to show any untruthfulness might be fatal to the

BAR's fraud charge against SILVER, the BAR filed this rather disingenuous response:

> Denied. By Respondent repeatedly stating to his client's medical providers that Respondent would protect their interests, after attorney's fees and costs, without stating that "attorney's fees and costs" included fees and costs for other unrelated cases, Respondent engaged in conduct constituting dishonesty, fraud, deceit, or misrepresentation. Additionally, Respondent failed to distribute any of the general liability medical coverage payment to any medical providers, despite his promise to the contrary. (Emphasis added.) RESPONSE TO REQUEST FOR ADMISSIONS, July 12, 2000.

The BAR would not candidly answer a simple factual question; did SILVER make any untrue statements? Instead, the BAR had to put its spin on the facts, stating its legal conclusion. However, after ten and one-half hours of trial, the referee stated,

> There was no evidence whatsoever offered or received which showed any intent by Respondent to mislead, defraud, misrepresent, or engage in any dishonesty. (Emphasis added.) RR:11.

The facts had not changed one iota; the referee had simply refused to accept the BAR's conclusory spin on the facts.

3. Similarly, the BAR glibly argues that the referee's finding of "guilty" is a mere finding of fact, reviewed only for support by "competent, substantial evidence," AB:11-16. The BAR argues the referee's legal reasoning is off limits; this Court may not review the legal conclusion of what constitutes professional misconduct. The culmination of this argument is in the following:

> Respondent argues that, despite the Referee's finding that he violated Rule 4-1.15, by clear and convincing evidence, a dissection of selected portions of the Report of Referee seems to indicate that the Referee was actually not convinced. AB:12.

The reality is that this Court defined in Neu that the legal

conclusion of professional misconduct must be established to the "clear and convincing" standard,; which this Court defined in Mischler as "...a firm belief and conviction, without hesitation." IB:14. SILVER has indeed asked this Court to review whether the referee's written conclusions of law show such a "firm belief and conviction, without hesitation."

4. This Court long ago clarified the difference, which demonstrates that the BAR's argument is simply inappropriate.

> In disciplinary matters, the ultimate judgment remains with this Court. However, the initial fact-finding responsibility is imposed on the referee. (Emphasis added.) Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968)

That is all SILVER asks of this Court. For example, does the referee's fact-finding that SILVER believed he was distributing his own money (RR:12) undermine the legal conclusion that SILVER "failed to safeguard" someone else's money?

II. THE BAR MAKES MISLEADING ARGUMENTS.

1. The actual factual findings by the referee include the following:

> Based on the testimony and evidence received, however, there is no indication that Respondent had any intent to deceive or withhold information about the settlement from Ramadan. (Emphasis added.) RR:5-6.

and

> That, however, does not end the inquiry. Rule 4-1.15(c) covers "disputed ownership" and requires an attorney to retain in the trust account funds to which the attorney and another party claim disputed interests. Respondent clearly did not retain the Wash King funds. Therefore the issues are: (a) his subjective intent in distributing the funds, and (b) the objective validity of his belief that his liens were so superior to MedLink's liens as to be essentially indisputable. Respondent has maintained that he had the legal right to take

> essentially all of the Wash King settlement pursuant to his attorney liens, leaving only a few hundred dollars to be contested by the client and the medical providers. Instead, he believes he distributed his money to the clients and the doctors, attempting to ensure some satisfaction to everyone. If his belief was objectively valid under Florida law, then he had no wrongful intent in distributing funds which he validly believed to be his property to distribute as he saw fit.
>
> Based on the evidence presented in this case, this Referee finds although Respondent made a good faith attempt to distribute the settlement funds in a fair manner so that everyone involved would receive something of value and no one would go empty handed, that he failed to safeguard the interests of Ramadan and Osborne in that he failed to present the matter to a court of competent jurisdiction to make a proper determination of how the funds should be distributed when it was obvious, or should have been obvious, that these two medical providers would not be willing to accept less than the amount owed to them. Although his actions appear to be well-intentioned, they were not appropriate, and in violation of Rule 4-1.15. (Emphasis in original.) RR:12-13.

The actual words establish that the referee did not rule that SILVER had violated Rule 4-1.15(b) (i.e., notice of the settlement) and did rule that SILVER had violated Rule 4-1.15(c) (i.e., disputed ownership of funds). Notwithstanding the pains taken by the referee to achieve clarity, the BAR argues extensively in its brief that the referee's ruling includes a violation of Rule 4-1.15(b). AB:13-16. That is simply untrue and no amount of spin will ever make it true.

2. In a similar manner, the BAR makes a misleading argument that Ramadan Hand Institute (variously referred to as "Ramadan" and "RHI") did not receive "notice" of the settlement. AB:15. The referee's finding is as follows:

> One of these letters was sent to Dr. Osborne "c/o Ramadan." Respondent acknowledges through inadvertence, a separate letter to Ramadan was not sent. Ms. Emerson-Webb, chief financial officer for Ramadan, testified that Osbourne and Ramadan had distinct bills that were being collected by one

> office, and that she had not received, nor seen, such a letter until this grievance proceedings were instituted. (Emphasis added.) RR:5.

SILVER argued in his INITIAL BRIEF that "MedLink," the corporation which operates RHI, had actual notice of the settlement:

> The referee found that Ms Webb testified that RHI had not received notice of the settlement. RR:5. The BAR suggests therefore RHI was not notified by SILVER of the case settlement. T3:197. However, that theory is inconsistent with attachments to the initial complaint to the BAR, which claimed amounts due for both RHI and Doctor Osborne....[Remainder of paragraph deleted.] IB:27

SILVER's brief went on to argue that...

> The attached computer printout of Doctor Osborne's bill - with the amount $5,385.00 circled - is on a page entitled "Medlink Management Services, Inc. D/B/A Ramadan Hand Institute."

...and that Ms. Webb's own words in her July 28, 1999, letter to the BAR rather dramatically contradicted her trial testimony...

> Owen B. K. Osborne, M.D., is employed by Medlink Management Services, Inc. and his clinic office and billings are operated under the fictitious name of Ramadan Hand Institute. CX7:3, para. e. * * * As an employee of Medlink, the professional services provided by Dr. Osborne were billed under Medlink's fictitious name "Ramadan Hand Institute." CX7:3, para. 6. * * * ...Mr. Silver was fully aware that Dr. Osborne's claims were included. He had been provided billings from our office of both the hospital and physician's professional fees. CX7:5, para. b. (Emphasis added.) IB:28-29.

Ms. Webb is one-third owner, President, and Chief Financial Officer of MedLink Management Services, Inc. (T1:8-9) which does business as "Ramadan Hand Institute" and several other fictitious names. CX1:8. The business office keeps the files and Ms. Webb admitted she might not get a copy of everything. T1:37, l.20 - 38, l.3. Ms. Webb's trial testimony also makes it clear that MedLink received telephone notice of the settlement.

> We had received a phone call from their office around the 24th of May, and the communication - I believe the woman that was spoken to at his office was a Virginia - was that they were in the process of settling the case and that they needed to have copies as of that date of what the total billings were for the hospital and physician. And both the hospital and the physician's office records were gotten together,... (Emphasis added.) T1:30.

In a rather amazing distortion, the BAR's brief states:

> Respondent argues that Ramadan (identified as MedLink in his brief) did receive notice of the settlement. IB p.27. However, this is contrary to Respondent's own testimony. [Footnote omitted.] AB:15.

The BAR then goes on to quote SILVER's admission that Ramadan (not its parent, MedLink) received no separate copy of the letter sent to Dr. Osborne. AB:15, footnote 2. However, SILVER'S brief really argued that MedLink - as Dr. Osborne's employer and Ramadan's parent - had indeed received actual notice of the settlement by telephone and the letter to Dr. Osborne. Yet, the BAR attempts to put its spin on the facts by blurring the difference between "a copy of the letter" and "actual notice," conveniently ignoring that MedLink is Ramadan's parent corporation. The BAR appears to incorrectly imply that SILVER was dishonest in his brief.

3. Similar deceptive tactics are evident in the BAR's argument that SILVER committed "four distinct violations" of Rule 4-1.15. AB:13. The BAR simply ignores the actual facts and again provides only its spin on the facts:

a. The BAR states as a fact that SILVER failed to notify Ramadan of SILVER's receipt of funds. As SILVER documented, Ramadan's parent corporation (MedLink) received actual notice as Dr. Osborne's employer. IB:26-29.

b. The BAR states as a fact that SILVER failed to deliver funds Ramadan "was entitled to." It is only the BAR's spin the Ramadan was "entitled to" anything at all. As SILVER documented, he had superior liens by which Ramadan was legally "entitled to" nothing whatsoever. IB:16-19.

c. The BAR states as a fact that SILVER "failed to render a full accounting on Ramadan's request." The depth of the BAR's deception is shown by several items. First, Ramadan's letter of June 2, 1999, did not request an accounting; the closest it came was a statement that Ramadan would not accept anything less than full payment without specific information. CX1:23. Second, Attorney Herb Webb, writing on behalf of Ramadan on June 9, 1999, stated, "...I ask that you obtain your client's permission to disclose [specified information]." CX7:56. Third, the BAR's own brief states that SILVER disclosed pertinent facts "...after Mr. Silver obtained his client's consent to discuss them." AB:6.

d. The BAR states as a fact that SILVER failed to retain the settlement proceeds in the trust account until the dispute was resolved. This is the only violation identified by the referee and is the very heart of this appeal. Thus, the BAR has an accuracy rate of twenty-five percent; or, viewed another way, a deceptive spin rate of seventy-five percent.

4. Nowhere is the BAR's argument more disingenuous than in discussing retaining liens authorized by this Court in Mones. AB:22. First, the double-speak, that this Court "...reversed the finding that Mones was not entitled to a retaining lien." AB:22.

Doesn't that mean this Court found Mones was entitled to a retaining lien? Apparently not, in the BAR"s version of case law, because the next page includes the following argument,

> If timely notice beyond the filing of a lawsuit is required to enforce a charging lien against a client fully aware of the lawyer's efforts, would not an assertion of a lien against a third party require some notice? AB:23.

Indeed, part of SILVER's brief stated that the BAR had repeatedly posited that SILVER had some legal duty to affirmatively disclose the amount of his potential retaining lien to Ramadan. IB:22. And SILVER discussed extensively how five justices of this Court agreed in Mones that such notice was not required. IB:23-24. Thus, the BAR's deceptive spin tactics appear to apply to the law as well as to the facts.

5. The final example of deceptive spin is in the BAR's statement of facts regarding the costs issue. AB:26

> Respondent admits in his brief that the affidavit of costs was served on September 5, 2000. IB p.38. He then accuses the Referee of failing to wait ten days to allow him the opportunity to object.
>
> Respondent is in error. *** He [the referee] did not sign the report until September 15, 2000, ten days after the proposed report and affidavit of costs were submitted. RR p.15.

As the BAR is fully aware, the BAR served its documents by Federal Express on September 5, 2000; and the BAR has in its file the receipts which show the items were delivered the following day, September 6, 2000. Thus, even without considering whether it is mandatory to add five days under Rule 1.090(e), Fla.R.Civ.P., the Report of Referee was signed nine days after the BAR's documents

were received.

III. ESTABLISHED LAW PRECLUDES THE CONCLUSION REACHED.

1. The BAR evades the issue of whether SILVER had liens superior to MedLink's, noting that SILVER "...does not cite to any disciplinary cases..." (AB:17) for the law of liens but relies instead on the cases in which this Court and others have spoken directly on the issue of attorney's liens. Instead, the BAR constructs an elaborate argument, quoting extensively from the Wagner case. Unfortunately, the word "lien" does not appear one single time in the entire Wagner case! Most notably, the BAR never once directly addresses the statement which ultimately defines the dispute in this entire case.

> Once the funds from the Wash King case were actually in SILVER's hands, he could impose on them a "retaining lien" for the amounts owed in other cases, as described in Mones, *supra.* IB:18.

2. Instead, the BAR "sort of" admits the validity of the retaining lien by the statement, "..a lawyer's professional and ethical duties go beyond legal duties." AB:19. True enough; but the BAR then goes on to pronounce its interpretation of Rule 4-1.15 as if such interpretation where clearly established law.

> Respondent should not have disbursed the settlement proceeds absent an agreement from all interested parties or a ruling from an impartial judge or arbiter. Either of those methods would have satisfied the mandate that the funds be held in trust "until the dispute is resolved." AB:19.

Indeed, this is precisely the absurd position SILVER anticipated in his brief, stating,

> Under the interpretation urged by the BAR (and apparently accepted by the referee) Lawyer Smith would be obligated to

> hold the funds in trust because of the possible dispute by Brown. And apparently the BAR demands those funds must be held in trust until Brown agrees to a resolution or a court rules on Brown's possible dispute. Thus, where there is not enough money to go around, the BAR urges this Court to require the lawyer to spend still more time and money to resolve a "dispute" which is utterly meritless at best and nonexistent at worst.
>
> 6. Perhaps it is difficult for BAR lawyers who receive a steady State paycheck to conceive of the impact of such a bizarre extension of the rule on private practitioners; who must pay income tax, unemployment tax, worker's compensation, health insurance, office rent and a secretary's salary out of those proceeds - before the lawyer can take a paycheck himself. (Emphasis in original.) IB:36.

3. The BAR then launches into a misguided attempt to show that MedLink's contract rights supercede SILVER's charging lien, as the Silverstein court ruled; the BAR completely ignores the retaining lien approved in Mones. More importantly, the BAR vitiates its own contract-law argument by stating,

> The reason for this limitation is not merely the language contained in the document, but also the lack of any language indicating that there were other fees and costs that could potentially reduce Ramadan's claim. Although, Mr. Silver testified that he intended such language to cover all of Mr. Pogue's cases, he never discussed his intent with Ramadan in any manner. AB:21.

The BAR appears to thereby establish that there was no mutual consent on a fundamental term of the contract (or no "meeting of the minds"); hence, no valid contract was ever formed, *ergo,* MedLink had no contract rights whatsoever. See, e.g., Midtown Realty, Inc. v. Hussain, 712 So.2d 1249, 1251 (Fla. 5th DCA 1998). Clearly a non-existent contract does not supercede the Mones type of retaining lien.

4. Even assuming that a valid contract was actually formed, the BAR's argument contravenes the facts and the law. The Silverstein court specifically stated,

> Nothing in the agreement suggested that Berger would have to stand in line behind the attorneys' financial interest in the case. 727 So.2d 313.
>
> * * *
>
> ...the effect of his [Silverstein's] agreement with the therapist was to partially or wholly divest himself from enforcing that lien. Nesbitt, J., concurring, Id., 313.

Ms. Webb testified MedLink understood that when the letter of protection mentioned attorney's fees that "...we are behind the attorney..." T1:66, l. 7-18; CX7:56. MedLink simply never inquired as to who else might have a claim in the case (T1:88, l.3 - 89, l.6); nor did MedLink ever ask how large that attorney's claim that it was "standing behind" might be. T1:89, l.14 - 90, l.7. Ms. Webb never asked her attorney-husband whether attorney's liens could be for more than the percentages she "understood" were

customary. T1:92, l.6-20. Ms. Webb's understanding was that it is the attorney's obligation to disclose - not MedLink's obligation to inquire - if there were other liens superior to MedLink's. T1:116, l.8-24. Ms. Webb acknowledged, however, that if her understanding was not correct under the law, MedLink had made a costly error. T1:116, l.25 - 117, l.4. It is simply absurd to argue the Silverstein contract-law analysis. MedLink was fully aware it would be "standing behind" the attorney's lien; MedLink simply failed to inquire what type and amount of attorney's liens it might be "standing behind."

IV. THE LEGAL CONCLUSION IS EX POST FACTO.

1. The BAR argues that its interpretation of Rule 4-1.15 cannot be an ex post facto application of law because the rule was adopted by this Court in 1987. AB:24. The BAR concedes that the rule permits the lawyer to make the initial determination of "ownership," but then reiterates the BAR's interpretation that the lawyer may not distribute proceeds based on his own evaluation of the "ownership." AB:25. Unfortunately for the BAR's argument, this Court thus far has never so construed this rule.

2. The BAR wants to create by interpretation a new Rule 4-1.15; a rule which precludes withdrawing funds without judicial approval, even when the lawyer has superior liens beyond even the most frivolous "dispute;" a rule in which the words "...belonging to the law firm..." may not be intelligently interpreted by the lawyer in light of Mones and Amacher and Sabin, but only by a judge - or worse yet - by a disappointed third party creditor. In short,

the BAR wishes to add by interpretation a new legal element, a classic *ex post facto* application of judicially-revised law.

V. THE FINDINGS ARE LEGALLY INSUFFICIENT.

1. The BAR evades the issue actually raised by mischaracterizing it as "...essentially an extension of the argument that the evidence is not clear and convincing." AB:13. Contrary to the BAR's spin, the actual issue raised here has nothing whatsoever to do with sufficiency of the evidence. Even assuming the referee's factual findings to be completely accurate and supported by evidence - those findings fail to establish all the elements required for a conviction.

2. As an example, in a criminal case of aggravated assault, it is the nature of the weapon used which distinguishes an "aggravated assault" from a "simple assault." I.O. v. State, 412 So.2d 42, 43 (Fla. 3rd DCA 1982) citing to Goswick v. State, 143 So.2d 817 (Fla. 1962). If the judge's fact-findings do not find the item to be a "deadly weapon," then a required element is missing, and the findings will not legally sustain a judgment of guilt as to the aggravated nature of the assault. Id., 43.

2. The BAR utterly failed to address these issues: (1) the required element of "reasonable time" is not included in the referee's fact-findings; (2) the required element of a presently existing dispute is insufficiently supported by the referee's fact-finding that a potential dispute was, or should have been, "obvious;" and (3) the referee's conclusions that SILVER "should have" presented his liens to a judge and SILVER "should not have" disappointed the doctor's expectations do not rest on required legal elements in the rule and thus cannot be engrafted into the

rule *ex post facto.* IB:34-38.

VI. THE COSTS ARE EXCESSIVE AND DISPROPORTIONATE.

1. SILVER has earlier addressed the BAR's mistaken position that the REPORT OF REFEREE was signed ten days after SILVER first received notice of the costs the BAR was claiming. The actual time was nine days, prematurely cutting off SILVER's opportunity to object to the BAR's cost affidavit. Page 7-8, supra.

2. Surprisingly, the BAR writes not a single word to dispute whether the BAR improperly included the costs for transcripts which were not used at trial. IB:39

3. Surprisingly, the BAR writes not a single word to dispute whether the BAR pursued a frivolous "dishonesty" charge for which the referee found there was "...no evidence whatsoever offered or received...." RR:11. IB:40.

4. Instead, the BAR merely argues that even the improper costs shown in this Record (the costs for transcripts not used at trial and the costs for a frivolous charge) should be taxed because the BAR was "partially successful." AB:27.

5. Clearly, the "fraud, dishonesty, etc." charge was far more serious than the "failure to safeguard" charge. The one involves the most fundamental value required of a lawyer - integrity. The other charge can involve a relatively minor error in legal reasoning - e.g., priority of competing liens - or an inaccurate weighing of facts - e.g., how "obvious" was it that a doctor would actually "dispute" the priority of the attorney's liens. As noted earlier, the BAR was unable to ever identify any specific instance

of untrue statements under the REQUEST FOR ADMISSIONS and was unable to introduce any evidence whatsoever of "dishonesty" in a ten and one-half hour trial. Page 1-2, supra. It is difficult to escape the conclusion that the BAR never had anything even approaching clear and convincing evidence to support pursuit of the "dishonesty" charge. It is difficult to escape the inference that the BAR continued to pursue the "dishonesty" charge for no reason other than to pressure SILVER to negotiate a plea bargain on the "failure to safeguard" charge. Having failed to do so, the BAR now asserts it should be rewarded by award of full costs because it was "partially successful."

6. Fortunately, this Court has demonstrated a bit more concern for fairness than its subordinate, the BAR.

> In view of the conclusions reached by the referee, we think it only fair that only one-half the costs be borne by the accused lawyer. Florida Bar v. Wagner, 212 So.2d 770, 774 (Fla. 1968).

In Wagner, the referee concluded the lawyer was not guilty of two counts out of four and the Court felt fairness dictated cutting the BAR's costs in half. What might the Wagner court have done if, as in the instant case, the referee found "...no evidence whatsoever offered or received...." to indicate guilt on the most serious charge the BAR pursued?

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing was served on the following persons by U.S. Mail/hand delivery/interoffice this_____day of_____, 20____:Edward Iturralde, Esq., 650 Apalachee Parkway, Tallahassee, Fl 32399-2300.

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