IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	Case No. SC01-73
Complainant-Appellee,	)	
	)	TFB Case No.
v.	)	19991121(15B)
	)	
ALBERT A. RAPOPORT	)	
	)	
Respondent-Appellant.	)	
	)	

THE FLORIDA BAR'S ANSWER BRIEF

JANET BRADFORD MORGAN, #849900
Bar Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

LORI S. HOLCOMB, #501018
UPL Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR., #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

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THE FLORIDA BAR'S
STATEMENT OF CASE AND FACTS

I. STATEMENT OF THE CASE

The Florida Bar filed a Petition Against the Unlicensed Practice of Law against Respondent January 10, 2001. This Court issued an Order to Show Cause on January 29, 2001. Respondent, representing himself, filed his Answer February 27, 2001. The case was subsequently assigned to Judge James T. Carlisle as referee on April 4, 2001. The Florida Bar filed a Request for Admissions on May 14, 2001, to which Respondent filed a response. Respondent filed discovery styled "Request for Admissions" to which The Florida Bar filed an Objection to Request for Admissions, stating that the discovery was improperly propounded and could not be answered as Requests for Admission. The Florida Bar filed a Motion for Summary Judgment and a Supporting Memorandum of Law on August 21, 2001.

Respondent filed a Motion to Halt Proceedings on August 30, 2001, which was denied by the Referee on September 5, 2001. Respondent then filed a Motion for Reconsideration/Enlargement of Time on September 10, 2001, to which The Florida Bar filed a Response on September 17, 2001. The Referee denied Respondent's Motion for Reconsideration on September 21, 2001. On September 24, 2001,

Respondent's counsel entered a Notice of Appearance. On September 26, 2001, the Referee entered an Order Granting Petitioner's Motion for Summary Judgment. Having requested and received an extension of time to file his Report, on November 1, 2001, the Referee issued his Report of Referee to this Court. Also on November 1, 2001, Respondent filed a Motion for Instructions, to which The Florida Bar filed a Response. This Court directed Respondent to file a Reply by December 3, 2001. Respondent filed a Reply on November 28, 2001, and an Objection to Costs on December 4, 2001. This Court issued an Order granting review of the Referee's report under Rule 10-7.1(e) on February 11, 2002. Respondent served Objections to the Report of Referee and to the grant of Summary Judgment on March 12, 2002, and having requested and received an extension of time, filed his Initial Brief with this Court on March 21, 2002.

II. STATEMENT OF THE FACTS

Respondent is not an attorney licensed by the State of Florida to practice law. (TFB Req. Adm., 1, 2; admitted, R. Resp. Req. Adm. 1, 2) Respondent is a resident of Boca Raton, Florida. (Petition, para. 3; admitted, Answer para. 3) Respondent represents persons in securities arbitration matters in Florida, operating his law practice from his Florida residence. (Petition, para. 5; admitted, Answer para. 5.) In the

course of providing these legal services in securities arbitration, Respondent engages in the following activities: he advises clients regarding the legal merits of their claims in securities arbitration matters (Petition, para. 6; admitted, Answer para. 6); he drafts and prepares securities arbitration claims for his clients (Petition, para. 7; admitted, Answer para. 7); he signs and files securities arbitration claims as the representative of his clients (Petition, para. 8; admitted, Answer para. 8); and he represents the clients in the securities arbitration proceedings (Petition, para. 9; admitted, Answer para. 9). In addition to representing claimants, Respondent also offers advice and representation to stock brokers defending claims in securities arbitration. (Petition, para. 10; admitted, Answer para. 10.) Respondent has in the past advertised his availability to represent persons in securities arbitration proceedings in the Fort Lauderdale Sun-Sentinel newspaper. (TFB Req. Adm., 3, 4; admitted, R. Resp. Req. Adm. 3, 4)

SUMMARY OF THE ARGUMENT

Distilled to their simplest form, the material facts in this case are not in dispute: (1) Respondent admits he is not a member of The Florida Bar, and (2) Respondent admits he represents persons in securities arbitration in Florida from his Florida residence. The remaining issue to be decided is purely a legal one: does Respondent's activity constitute the practice of law by a nonlawyer which may be prohibited by this Court?

This Court has found that the exact activities admitted by Respondent constitute the practice of law. The Florida Bar re Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Fla. 1997). Though admitted in the District of Columbia, Respondent is a nonlawyer in the eyes of Florida. Therefore, absent state or federal law expressly authorizing the activity, and preempting this Court's regulation of unlicensed practice of law, Respondent should be enjoined.

Respondent's sole legal argument to the merits of the Referee's decision is that the Federal Arbitration Act preempts state regulation of unlicensed practice of law. This is incorrect. The Federal Arbitration Act is a substantive law created by Congress to ensure the enforcement of private arbitration contracts. It contains no

provisions, express or otherwise, regarding the representation of persons in arbitration proceedings.

Therefore, because the material facts are admitted by Respondent, and because Respondent's conduct as a matter of law constitutes the practice of law, and is not authorized by any federal or state law, the Referee's findings and his legal ruling are correct, and should be upheld by this Court.

THE FLORIDA BAR'S ARGUMENT IN ANSWER TO POINTS I AND II OF RESPONDENT'S INITIAL BRIEF

I. AS A MATTER OF LAW, RESPONDENT HAS ENGAGED IN THE UNLICENSED PRACTICE OF LAW BY THE REPRESENTATION OF OTHERS IN SECURITIES ARBITRATION PROCEEDINGS IN FLORIDA AS NO FEDERAL STATUTORY EXCEPTION EXISTS TO PREEMPT THE STATE'S LICENSING REQUIREMENTS.

As a matter of law, this Court has already decided that the representation of parties in securities arbitration in Florida by a nonlawyer constitutes the unlicensed practice of law. The Florida Bar re Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Fla. 1997) [hereinafter "Securities Arbitration Opinion"]. The only issue to be decided in The Florida Bar's action against Respondent is the legal question of whether the holding of the Securities Arbitration Opinion applies to Respondent. There is no factual dispute as to Respondent's status. He is not a licensed Florida attorney. (TFB Req. Adm. 1, 2; R. Resp. Req. Adm. 1, 2) He is admitted to the Washington, D.C. bar. (Petition, para. 2; Answer, para. 2) He resides in Florida. (Petition, para. 3; Answer, para. 3)

Nor is there any dispute regarding Respondent's practice. He represents securities arbitration clients in Florida and in conjunction with that representation, engages in each of the activities that are described in the Securities Arbitration Opinion:

Advising clients on the legal merits of their claims; drafting, signing, and filing securities arbitration claims; and representing clients in the arbitration proceedings. (Petition, para. 5, 6, 7, 8, 9; admitted, Answer, para. 5, 6, 7, 8, 9) He advertises his securities arbitration services in Florida. (TFB Req. Adm. 3, 4; R. Resp. Req. Adm. 3, 4) The Referee's Report made findings of these prima facie facts, as supported by the record admissions of Respondent in his Answer and Response to Request for Admissions. The findings of the Referee are presumed correct and will be upheld unless clearly erroneous and lacking evidentiary support. The Florida Bar v. Catarcio, 709 So. 2d 96 (Fla. 1998).

While Respondent's "Objections of Albert A. Rapoport" lists some objections to certain findings of fact in the Referee's Order Granting Summary Judgment, these objections are not sufficient to create an issue of fact to defeat summary judgment, particularly where the findings are based on Respondent's own admissions in the record. First, the factual objections listed are not discussed or argued in Respondent's Brief. Also, Respondent lists but does not explain his objections to Findings of Fact 1 and 3. Finding of Fact 1 states that Respondent is not a licensed attorney in Florida, and is therefore not licensed to engage in the practice of law in Florida. (Ref. MSJ Order, FOF. #1) This fact is admitted by Respondent in the record. (TFB Req. Adm. 1, 2; admitted, R. Resp. Req. Adm. 1, 2) Finding of Fact

3 states that Respondent operates a law practice in Florida and represents persons in securities arbitration. (Ref. MSJ Order, FOF. 3) This fact is also admitted by Respondent in the record. (Petition, para. 5; admitted, Answer, para. 5) Therefore, Findings of Fact 1 and 3 are clearly supported by admissions of Respondent. Respondent also makes a blanket objection to Findings of Fact 3, 4, 5, 6, 7, 8, and 9, based on their alleged failure to refer to the securities arbitration services as matters of interstate commerce, and failure to characterize the services as "federal." These objections are essentially legal arguments, not a challenge to the underlying facts. Also, these findings of fact are again clearly supported by record admissions of the Respondent, as was noted by citation with each finding by the Referee. (Petition, para. 3-8, TFB Req. Adm. 3, 4; Answer para. 3-8; R. Resp. Req. Adm. 3, 4) Therefore, no material factual issues remain and the referee properly made his recommendation as a matter of law.

For the purposes of analyzing an unlicensed practice of law case, a Respondent licensed only in another jurisdiction begins on the same footing as a Respondent with no license in any jurisdiction. Both are considered nonlawyers under Florida law. "Florida has a unified bar, and all persons engaged in the practice of law here must be members of that bar." Chandris v. Yanakakis, 668 So. 2d 180, 184 (Fla. 1995). Unless there is a specific exception, this general rule applies. Absent express

legislative authority, a nonlawyer cannot engage in the practice of law in Florida. At the time of the Securities Arbitration Opinion, this Court found no such legislation to preempt its regulation of unlicensed practice of law. Respondent now argues that the Federal Arbitration Act (FAA) creates a preemption. 9 U.S.C.A. 1, et seq.[1]

Contrary to Respondent's argument, the FAA does not preempt state law in the area of this Court's regulation of unlicensed practice of law. Rather, the FAA is silent as to representation in arbitrations. The fact that a specific rule rather than silence is required is supported by the U.S. Supreme Court's decision in Sperry v. State of Florida ex rel. The Florida Bar, 373 U.S. 379, 83 S. Ct. 1322 (1963), as well as in decisions by this Court. The Sperry case dealt with specific federal legislation allowing nonlawyer representation before a federal agency and held that Florida could not enjoin the activity as the unlicensed practice of law where the federal rule specifically allowed it. The Court held that "Florida has a substantial interest in regulating the practice of law within the state and that, *in the absence of federal*

[1]The issue of preemption of regulation of nonlawyers in the securities arbitration area by the FAA was raised in briefs filed with this Court in the Securities Arbitration Opinion. However, FAA preemption was not specifically addressed in the Court's Opinion. *See*: Answer Brief of The Florida Bar, filed in The Florida Bar re Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Fla. 1997).

legislation, it could validly prohibit nonlawyers from engaging in this circumscribed form of . . . practice." Id. at 383 (emphasis supplied).

As further support, in Chandris v. Yanakakis, 668 So. 2d 180 (Fla. 1995) this Court found that the federal Jones Act did not preempt Florida regulation of the practice of law as there was no specific authorization in the Jones Act allowing nonlawyers to practice. *See also* The Florida Bar v. Catarcio, 709 So. 2d 96 (Fla. 1998) (federal bankruptcy statute setting administrative requirements for nonlawyer bankruptcy petition preparers did not preempt state authority to regulate unlicensed practice of law). The Court in Chandris also found that there exists no general federal law exception to Florida's bar admission requirement. Chandris at 184. With no specific preemptive legislation, this Court retains its authority to regulate the practice of law in Florida and to prohibit unlicensed practice of law.

Therefore, in order for the FAA to preempt state licensing requirements, it would have to contain a specific provision regarding representation in arbitration proceedings. However, "the FAA contains no express preemption provision, nor does it reflect a Congressional intent to occupy the entire field of arbitration . . . the FAA was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate' and to place such agreements 'upon the same footing as other contracts.'" Volt Information Sciences, Inc. v. Board of Trustees of the Leland

Stanford Junior University, 489 U.S. 468, 477; 109 S. Ct. 1248, 1255 (1989). The purpose of the FAA was to require courts "to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Volt 489 U.S. at 478, 109 S. Ct. at 1248. Therefore, what the FAA will preempt is state law that singularly limits or prevents the enforceability of a contract to arbitrate. *See*: Doctors Associates Inc. v. Casarotto, 517 U.S. 681, 688; 116 S. Ct. 1652, 1657 (1996). Respondent has not, nor can he, cite to a provision of the FAA which would preempt Florida law and permit Respondent's practice of law, because none exists. Therefore, as a matter of law, this Court retains its jurisdiction over the activities of nonlawyers representing parties in the securities arbitration field.

It is noted that Respondent cites to twenty-two federal cases on pages 8-12 of his Initial Brief in support of his preemption argument. However, in all of these cases, the courts found federal preemption when state law directly conflicted with an express provision of the FAA or its purpose of ensuring enforceability of arbitration contracts. Therefore, these cases are not applicable here, where there is no conflict between state regulation of nonlawyers and any provision of the FAA, or its purpose.

Respondent also argues that this Court's rejection of The Florida Bar's proposed Amendment to Rule 3-4.1 somehow equates to this Court's refusal to exercise its authority to prohibit the unlicensed practice of law of non-Florida

attorneys. This argument is also misguided. In rejecting this proposed Amendment, this Court expressed jurisdictional concerns over regulating the unethical conduct of non-Florida lawyers in mediations and arbitrations under Chapter 3 of the Rules Regulating The Florida Bar. Amendments to Rules Regulating The Florida Bar, 795 So. 2d 1, 2 (Fla. 2001). However, this Court has clearly and consistently affirmed its jurisdiction over the unlicensed practice of law by non-Florida lawyers under Chapter 10 of the Rules Regulating The Florida Bar. Amendments to Rules Regulating The Florida Bar — Advertising Rules, 762 So. 2d 392 (Fla. 1999) (out-of-state lawyers are subject to unlicensed practice of law regulation under Chapter 10, Rules Regulating The Florida Bar for purposes of regulation of solicitation and advertising); Chandris v. Yanakakis, 668 So. 2d 180 (Fla. 1995); The Florida Bar v. Tate, 552 So. 2d 1106 (Fla. 1989). *See also*: Vista Designs v. Silverman, 774 So. 2d 884 (4th DCA 2001). Therefore, this Court's decision not to regulate the ethical conduct of non-Florida lawyers under Chapter 3 does not reflect on the Court's long-standing jurisdiction over non-Florida attorneys who engage in unlicensed practice of law prohibited under Chapter 10.

THE FLORIDA BAR'S ARGUMENT IN ANSWER TO POINT III OF RESPONDENT'S INITIAL BRIEF

II. ALL PRIMA FACIE ELEMENTS OF THE FLORIDA BAR'S CASE WERE CONCLUSIVELY ESTABLISHED BY RESPONDENT'S ADMISSIONS ON THE RECORD LEAVING NO MATERIAL ISSUE OF FACT AND CREATING A STANDARD OF A DE NOVO REVIEW OF THE LEGAL ISSUES.

Rule 10-7.1(b)(5) provides: "If a response or defense filed by a respondent raises no issue of material fact, any party, upon motion, may request summary judgment and the court may rule thereon as a matter of law." R. Regulating Fla. Bar 10-7.1(b)(5). Pursuant to Rule 10-7.1(b)(5), the Referee's Order granted The Florida Bar's Motion for Summary Judgment, making findings of uncontroverted material fact, and finding as a matter of law that Respondent engaged in the unlicensed practice of law. In his Order, the Referee found that Respondent admitted to all material factual allegations needed to then make a finding as a matter of law. Ref. MSJ Order, FOF #10. Respondent's Initial Brief makes no factual argument at all, only arguing against the legal conclusion that Respondent is subject to state regulation as a nonlawyer. The Florida Bar conclusively established, and Respondent has not refuted, that no issue of material fact could be shown by Respondent since the prima facie factual elements

of unlicensed practice of law are all admitted as alleged. *See*: Ref. MSJ Order, FOF #1-10. Therefore, the Referee acting in accordance with Rule 10-7.1(b)(5) properly found, as a matter of law, that the Respondent's conduct constituted the unlicensed practice of law.

Appellate courts review summary judgment orders de novo with all facts and inferences to be resolved in favor of the party opposing the summary judgment. The Florida Bar v. Cosnow, 797 So. 2d 1255 (Fla. 2001). On review, if this Court agrees that there are no issues of material fact, the correctness of the summary judgment is reviewed de novo as a matter of law. Glucksman v. Persol North America Inc., 27 Fla. L. Weekly D492 (Fla. 4th DCA Feb. 27, 2002). The Florida Bar maintains that the law clearly supports the Referee's legal conclusion that Respondent's activities are the unlicensed practice of law under the Securities Arbitration Opinion, and that no federal or state law preempts the state unlicensed practice of law regulations. (See Argument in Point I of this Brief.)

While Rule 10-7.1(b)(5) specifically permits a Referee to rule on a summary judgment, Rule 10-7.1(c)(3) also provides that the "Florida Rules of Civil Procedure . . . not inconsistent with these rules shall apply in injunctive proceedings . . . ." This Court has found in other Florida Bar cases that Florida Rules of Civil Procedure, Rule 1.510(c) governing summary judgment procedure does apply. The Florida Bar v.

Miravalle, 761 So. 2d 1049 (Fla. 2000); The Florida Bar v. Cosnow, 797 So. 2d 1255 (Fla. 2001). Florida Rule of Civil Procedure, Rule 1.510(c) makes reference to a hearing with regard to setting the time for service of the motion and affidavits. It is noted that at least one District Court of Appeal in Florida has interpreted Rule 1.510(c)to require a hearing. Kozich v. Hartford Insurance Company of Midwest, 609 So. 2d 147 (Fla. 4th DCA 1992); Greene v. Seigle, 745 So. 2d 411 (Fla. 4th DCA 1999). No hearing was held on the Motion for Summary Judgment. The Florida Bar maintains that Respondent had notice and opportunity to respond to the Motion for Summary Judgment filed August 21, 2001, and that all facts necessary to establish a prima facie case were admitted by Respondent making this matter ripe for a summary judgment ruling as a matter of law. There are simply no additional material facts which could have been proven, nor does Respondent identify any such potential facts. However, if this Court should determine that the rulings in the Greene and Kozich cases are controlling in this matter, The Florida Bar respectfully requests that this matter be remanded to the Referee to conduct a hearing on the Motion for Summary Judgment, and that this Court deny Respondent's request that the proceedings be dismissed.

Respondent also attacks The Florida Bar's professionalism, misstating that The Florida Bar "declined to answer discovery." The record shows that Respondent

served an improperly prepared Request for Admissions which sought compliance under Florida Rules of Civil Procedure, Rule 1.370. As The Florida Bar pointed out in its Objection to Respondent's First Request for Admissions, Respondent's Requests for Admission did not seek admission of the truth of matters which could be answered with a written specific admission or denial as required under Rule 1.370. Instead, Respondent's Requests sought lists of information. The Florida Bar's objections to these requests for admissions were timely and well-founded. The Florida Bar is not required to attempt to translate the improper "Request for Admissions" into some other form of discovery, which may have been intended by Respondent. The Florida Bar fully expected Respondent, upon being put on notice that the discovery was improperly prepared, to correct his erroneous discovery request, and re-serve it, at which time The Florida Bar would have gladly provided a response. The Florida Bar does note, however, that the information sought under the improperly drafted Request for Admissions pertained to identification of other Florida Bar prosecutions. The Florida Bar believes the requests to be irrelevant to the proceeding at hand, and The Florida Bar probably would have objected to responding to these requests even had they been properly drawn. Further, the information sought in these Requests for Admission would not have developed any facts which would be considered material and necessary to the Referee's decision under a Motion for Summary Judgment.

Finally, Respondent challenges the Referee's denial of Respondent's Motion for Enlargement of Time for response to the Motion for Summary Judgment. A motion for continuance is addressed to the sound judicial discretion of the trial court and absent an abuse of that discretion, that court's decision will not be reversed on appeal. Tropical Jewelers, Inc. v. NationsBank, 781 So. 2d 381 (Fla. 3d DCA 2000). In the instant case, the Referee made his ruling denying continuance in the context of a case which had been pending before him for more than five months, and which he was ordered to complete within 180 days of this Court's Order of March 28, 2001. The Respondent had had ample time and opportunity to develop his case, and to conduct discovery and formulate his argument. In fact, Respondent included substantive argument addressing the Motion for Summary Judgment in his Motion for Enlargement of Time. Therefore, the Referee's denial does not constitute an abuse of discretion.

CONCLUSION

The Referee's findings of fact are supported by the record evidence and should be upheld. The facts, as determined by the Referee, make up the prima facie case for unlicensed practice of law in securities arbitration. There are simply no other facts which could be offered to create an issue of fact in this case. Respondent admits, and cannot dispute, that he is not a member of The Florida Bar, and that he resides in Florida. Further, Respondent admits, and does not retract in any way, the nature of his activities in representing clients in securities arbitration matters.

Consequently, this case was properly decided, and should be reviewed, as a matter of law. The Securities Arbitration Opinion held as a matter of law, that nonlawyer representation in securities arbitration is the practice of law. Respondent has failed to identify any express preemptive provision of the FAA which would allow his otherwise prohibited representation. Therefore, Petitioner asks that this Court ratify and approve the Referee's finding of summary judgment and that Respondent be enjoined from the unlicensed practice of law and that costs of $530.40 be awarded in accordance with the Referee's report and recommendation.

Respectfully submitted,

JANET BRADFORD MORGAN, #849900
Bar Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of The Florida Bar's Answer Brief have been furnished by regular U.S. mail to Ainslee R. Ferdie, Esq., Attorney for Respondent, 717 Ponce de Leon Blvd., Suite 215, Coral Gables, FL 33134 and to UPL Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this _____ day of April, 2002.

_____
JANET BRADFORD MORGAN

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that The Florida Bar's Answer Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this Answer Brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

JANET BRADFORD MORGAN