IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. SC09-1012
The Florida Bar File No. 2006-71, 062 (11N)

THE FLORIDA BAR,

Complainant,

v.

HENRY NISSIM ADORNO,

Respondent.

On Petition for Review

ANSWER BRIEF OF RESPONDENT AS TO SANCTION RECOMMENDATION AND INITIAL BRIEF OF RESPONDENT AS TO RECOMMENDATION REGARDING RULE VIOLATIONS

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STATEMENT OF THE CASE AND FACTS

A. THE CASE

The Bar seeks review of the Referee's recommendation that Henry (Hank) Adorno be publicly reprimanded for violations of Rule 4-1.7 (Conflict of Interest; Current Clients), Rule 4-8.4 (Misconduct) and Rule 4-1.5 (Excessive Fee).

The case grows out of a May 2004 settlement with the City of Miami on behalf

of individual plaintiffs. The settlement occurred in a case brought as a class action, where the class had not yet been certified. The mediator, former Circuit Judge Henry Latimer, initiated the idea of the possibility of individual settlements when the City balked at a class settlement number. The settlement sum for the individuals, offered by the City and accepted by the plaintiffs, was grossly disproportionate to their damages because the City (unbeknownst to Adorno) incorrectly believed that the individual settlement would preclude the class from seeking a refund for the City's improper collection of a fire rescue assessment against City of Miami property owners. The class and the City later vacated the individual settlements, *Mazstal v. City of Miami*, 971 So. 2d 803 (Fla. 3d DCA 2007), and the class ultimately was compensated. The Bar filed a complaint against Adorno alleging that his role in the individual

settlement process constituted a conflict of interest with another "client" – the putative class – and that the individual settlement breached a "fiduciary duty" to the putative class, and that the fee received was "excessive." The Referee, in a summary judgment order entered after both the Bar and Adorno filed statements of undisputed facts, recommended a finding in favor of the Bar, but he rejected the Bar's request for a suspension, finding that a public reprimand was appropriate.

In this Court Adorno seeks reversal of the Referee's recommendation as to the rule violations because: (1) he could not have had a conflict with a current client (Rule 4-1.7) since the uncertified class members were clearly not his clients under well established state and federal law; (2) he did not breach any duty to the putative class – either implied or express – and the settlement for the individual plaintiffs did not prejudice the class and; (3) the fee received from the individual settlement was not excessive, and indeed was to be credited against the final fee when the class was ultimately certified and a class-wide resolution accomplished. Nevertheless, if the rule violation recommendation is accepted, Adorno seeks affirmance of the public reprimand recommended by the Referee.

B. THE FACTS

1. Sanctions

The Referee made his rule violations recommendation on cross motions for

summary judgment. He made his sanction recommendation after a multi-day hearing

in which a host of respected lawyers and citizens attested to Adorno's impeccable reputation and character. The Bar does not contest the testimonial facts of great character and integrity that led the Referee to say that Adorno "should be commended and recognized" for his lifetime of good work. Appendix A, Report of Referee, p. 7. Those facts show that Adorno did not, would not, and could not have intentionally violated any of the rules pertinent to this case, and that his uncontroverted testimony to that effect was credible and convinced the Referee that his actions did not intentionally violate any ethical precepts.

The Bar's complete omission of the January 12 and 13, 2010 (Volumes 1 and 2) sanction hearing evidence, adduced through over 20 witnesses, reflects the Bar's failure to recognize the importance of that evidence in the context of the whole case; i.e., whether Adorno knowingly violated any Bar rules. That evidence, unrebutted by the Bar, included:

- Raoul Cantero, who has known Adorno for 28 years and was a partner in Adorno & Yoss before being appointed to the Florida Supreme Court:

> Well, one of the reasons I went there was to work with Hank. Adorno had a great reputation as a lawyer in the community, a great litigator, a great trial lawyer. And

> one of the reasons I went there was to get mentored by Hank and become a good lawyer myself.
>
> * * *
>
> There was no question about ethics with Hank. He always would do the right thing, whatever was required by the law. There was no question of whether we could get around it or not do it. I learned from him that whatever the law required, that's what you did. And you had to work within those parameters.
>
> * * *
>
> Q. And in the process of those efforts to advocate for something, did you ever see him act unethically or dishonestly or untrustworthily?
>
> * * *
>
> A. Never.

Sanction Hearing, Vol. 1, pp. 74-79.

- H.T. Smith, a lawyer, law professor, former President of the National Bar Association, who has known Adorno for over 30 years:

> A. Hank Adorno's reputation in the community for honesty and integrity is very high and today it is still very high. I know about this case and obviously it's been in the papers, it's been in the courts. But people know Hand Adorno and have

> worked with him for years in all our projects in the Bar, Judge, in all kind of projects in the community, and his reputation is still very high.

Id. Vol. 2, p. 9.

- Don McClosky, partner in Ruden McClosky, member of the Florida Bar for over 50 years:

> Q. Are you familiar with Mr. Adorno's reputation in the community for honesty, integrity and ethicalness?
>
> A. I believe I am.
>
> Q. And what is that?
>
> A. It's impeccable.
>
> Q. And in your view, would you trust Mr. Adorno and believe what he told you under oath or not under oath?
>
> A. Without question.

Id., p. 36.

- Dieter (Nick) Gunther, whose law firm merged with Adorno & Yoss a decade ago:

> Q. Now, with respect to Mr. Adorno personally, do you have an opinion as to his reputation for honesty and ethicalness?
>
> A. Yes, I do.

> Q. What is that opinion?
>
> A. Very positive; that he is honest and ethical in all my dealings and everything I've ever observed from before the merger until the present date. And I'm aware of the [*Mazstal*] court's decision in this case.

Id., p. 48.

- Robert Beatty, lawyer, Publisher *South Florida Times*, former General Counsel for BellSouth of Florida and *The Miami Herald*:

> Q. During the 30 years that you've known him, have you become familiar with his reputation in the community for truth and integrity?
>
> A. Sure.
>
> Q. What is it?
>
> A. It's beyond reproach.
>
> Q. Would you believe him under oath?
>
> A. Absolutely.
>
> Q. Do you have a better than average understanding of the fire fee matter?
>
> A. Better than average.
>
> Q. Would anything related to the Bar complaint affect your opinion of Hank or cause you to change your opinion of him?

A. Not at all.

Q. Would you still believe him under oath?

A. I would still and I do.

Id., pp. 211-212.

The lawyers who lined up to echo Adorno's integrity and fealty to the rules of law and ethics were the *creme de la creme* of the South Florida legal community. They included Irwin Block, a 50 year plus member of the Bar; Cesar Alvarez, the former CEO of Greenberg Traurig ("He has an excellent reputation for truth and honesty"); Arturo Alvarez, the past President of the Cuban American Bar Association ("He has enjoyed a reputation for competence and integrity"); Bruce and Evelyn Greer, lawyers and President of Fairchild Tropical Gardens (Bruce) and former Mayor of Pinecrest, Florida and former member of the Miami-Dade School Board (Evelyn) ("[A] man of honor and integrity"); Dean Colson, Colson, Hicks law firm, University of Miami Board of Trustees ("[His] reputation for truthfulness is unimpeachable). *See* Sanction Hearing Affidavit Exhibits, 14, 17, 18, 19, 22.

- Jeffrey Berkowitz, a lawyer/real estate developer, who was "very familiar" with the allegations" against Adorno, who "care[s] deeply" about Hank

and "the judicial system," said:

> I served for many years as a member of the Bar and I've known Hank Adorno for many, many years, and he's represented me; he saved my professional life on more than one occasion. We've had ethical discussions in strategizing on how to pursue our cases. I probably have, at any given time, a dozen or more attorneys in different firms that I work with. There is nobody I've ever encountered who is as bright or as ethical as I believe Hank Adorno is.

Sanctions Hearing, Vol. 2, p. 57.

It was not just lawyers who attested to Adorno's integrity and reputation for truth and veracity; business executives and community leaders, all whom knew about the Bar's charges, came to court, including:

- Fran Allegra, Executive Director, "Our Kids of Miami-Dade and Monroe Counties:" "Hank's a man of great integrity . . . . As soon as you develop a relationship with him, you know he's a man of his word." *Id.*, pp. 28-30.

- Brenda Marshall-McClymonds, Director of the Trust for Public Lands: "He's held in extremely high regard and I think its because people have seen over the years how hard he has worked and how unselfishly he has committed his time, his personal resources, to the benefit and betterment of the community, with a particular emphasis on underserved neighborhoods." *Id.*, pp. 42-43.

- Sarah Nesbitt Artecona, Chief of Staff to the Chief Financial Officer of the University of Miami, whose parents, both judges, "encouraged me to work for him and join him in civic activities" and found their confidence in him well placed: "I would believe him whether he was under oath or not." *Id.*, pp. 102-103.

Adorno, and his partners, Mitch Bloomberg and Robin Campbell, all "under oath," explained how this contretemps began: with a suggestion by the mediator, Henry Latimer.

- Mitch Bloomberg, who had decades of class action experience:

> A. Judge Latimer said, has the class been certified, and somebody said no. Judge Latimer said, have you thought about individual settlements? Somebody said no. Judge Latimer said, would you do that, would you talk to your clients about individual settlements?
>
> Q. Did you see anything wrong with what Judge Latimer asked you to do?
>
> A. No.
>
> Q. Why not?
>
> A. Because I knew that prior to certification, you could — named plaintiffs who were ultimately likely to be the class representatives had every right to settle their claims individually.

Q. What happened next?

A. We left – we did what Judge Latimer asked us to do, we left the room and were going to go see our clients.

Q. And did anything happen between the time you left the room and –

A. Yeah, as we were walking out of Mr. Adorno's office, Hank turned to me and said, can we do that?

Q. What you take him to mean by that?

A. I took him to mean can we settle individually.

Q. What did you tell him?

A. I said yes, as long as we don't prejudice the putative class – the class' substantive rights.

Q. Were you surprised by Hank's question?

A. No.

Q. Why not?

A. Because I wouldn't have thought Hank would have known the answer to that question.

Q. How come?

A. Because although it's pretty

straightforward to people who do class actions, it's not something that a non class action lawyer would know. He wouldn't have any reason to know.

Q. Did you do any research before you gave him the answer?

A. I did not .

Q. How come?

A. Because I knew the answer.

Q. Was your advice sound advice to him then?

A. Absolutely.

Q. Do you believe that even today, after everything that's happened it was sound advice?

A. Absolutely.

Q. Was there any doubt in your mind?

A. None whatsoever.

Q. Did Robin [Campbell] agree?

A. Yes.

* * *

Q. Was Hank relying upon your advice during those discussions in dealing with the individual settlement discussions?

A. Yes. I told Hank it was perfectly proper as long as we didn't prejudice the substantive rights of the class, and I think he did everything he could to make sure that the offer that we're about to make did not. And had I felt that any portion of the offer that he was going to make when he went back to see Judge Latimer would have prejudiced the class, I would have said, you can't do that.

Sanctions Hearing, Vol. 1, pp. 150-151, 159.

- Robin Campbell, also an experienced class action litigator:

Q. After Judge Latimer asked you to consider a settlement, what happened?

A. We left Hank's office and were going back to the board room which was like 25 feet away, we walked out and Hank was walking between Mitch and I, as Hank said to Mitch, he said, can we do this. And Mitch – you know, can we settle individually. And Mitch said, yes, as long as we don't prejudice the substantive rights of the class. I said, I agree.

And then we went back into the conference room and then had a discussion with the clients that Mitch discussed yesterday.

Q. What is your understanding of substantive rights of the class? What was it back then?

A. Back then and today, not to prejudice

the ability for them to proceed with the case.

Q. Do you believe the legal advice that was given back then was correct?

A. Yes.

Q. How about today?
A. Same.

Id., Vol. 2, pp. 91-92.[1]

Bloomberg and Campbell were the target of a Bar inquiry based on the same allegations brought against Adorno, however the outcome as to them was benign: "No probable cause and a letter of advice." *Id.*, Vol. 1, pp. 79-80.

- Sanford Bohrer, a Holland & Knight partner, who is Chair of the firm's class action practice group, explained why, had Adorno asked him if he could implement an individual settlement, he would have told him yes because the law was as Bloomberg and Campbell understood it to be:

> A. Until there's a formal certification, you do not represent anyone but the named plaintiffs; that's the ABA rule, the federal rule, and the State of Florida rule.
>
> * * *

[1] Adorno was not an experienced class action lawyer and relied on Bloomberg and Campbell's advice: "[T]here is no way in the world that Mitch Bloomberg would ever intentionally, ever mislead me as to what the law is." "With Mitch's answer and Robin's affirmation of the answer, there would be no reason for me not to proceed." *Id.*, Vol. 2, pp. 128-129.

A. Yes, he could [accept the settlement].

Q. Why is that?

> A. I don't know why the city offered what it did. They grossly overpaid. Everybody knows that. But from his point of view for his clients, they were on board, they were free to take an unfairly generous offer from the other side. This happens, I can't tell you how many times it happens.
>
> * * *
>
> I don't know what was going through the City's mind. I don't know Mr. Arriola [City Manager], I don't know Mr. Diaz [Mayor], I don't know what their lawyers were thinking. But from Mr. Adorno's point of view, until the Court – and I understand what the judge has said, what Judge Lopez said. Until the Court actually certified a class, he did not have the authority to say he represented those unnamed class members and he had all the right in the world to settle on behalf of his – the clients who actually were signed up with his firm.

Id., Vol. 2, pp. 115-117.

The Bar's effort to paint Adorno's conduct as "intentional" and meriting suspension, completely overlooks the Referee's comments about the state of the law, the weakness of the Bar's case law submissions, and his belief that if there was any violation, it was not an intentional violation of known, clearly established rules:

THE COURT: I think I wrote in my [summary judgment] order in this case that I recognize that there's some potential conflict in the law as to the fiduciary duty owed by the respondent [Adorno] to the putative class.

* * *

THE COURT: . . . Mr. Adorno didn't have the benefit of the Third District [*Mazstal*] case like other lawyers could have had before this transaction occurred, right?

[Bar Counsel] Ms. Prato: I understand that.

* * *

THE COURT: Well, factually [referring to Bar's cases], these cases are a lot easier than my case, aren't they?

Ms. Prato: The Bar concedes that the facts are different.

* * *

THE COURT: If the Supreme Court ultimately decides that he owed a duty to the putative class, then at the very least he would be under a negligence standard, wouldn't he?

* * *

THE COURT: If the Supreme Court ultimately determines that; one, that I'm

> wrong and that he owed no specific fiduciary duty to the putative class, it would seem to me that the second part of my finding in this case would fall as well, wouldn't it?
>
> Berman: Yes.
> THE COURT: Because, if he owed no duty, he could settle with the Plaintiffs and he could accept a fee.
>
> THE COURT: . . . I think I made it clear to some extent in my order and I'll make it more clear here in court, the struggle that I have with respect to what the state of the law is on this issue.

Id., Vol. 1, pp. 15, 17, 18, 31, 39, 43. Those comments cannot be squared with the Bar's misleading submission that the Referee's Summary Judgment Order reflects knowing, not negligent conduct. Bar Brief, p. 33. To the contrary, the Referee's comments support Adorno's submission that he did not knowingly violate any ethical rules because not even the Referee is sure what the rules require. And, if this Court accepts the Referee's invitation to determine what they are and creates some "implied duty" to a putative class, Adorno cannot be sanctioned now for conduct that was appropriate then. *Cf., Strickland v. Washington*, 466 U.S. 668, 669 (1984), quoted with approval in *Willacy v. State*, 967 So. 2d 131, 141 (Fla. 2007): "A fair assessment of attorney performance

requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time."

Despite the evidence, and the court commentary, and the applicable law, the Bar

objects to the Referee's sanction recommendation saying that the Referee's use of subsections 4.33 and 7.3 of the Standards (negligent conduct) was incorrect; that Adorno's conduct was "knowing conduct . . . which requires suspension" under standards 4.32 and 7.2. Bar Brief, p. 33. The Bar devotes 31 pages (1-32) to the period between May 28, 1998 when the plaintiffs retained counsel to challenge the City's Fire Rescue Assessment, to October 29, 2008 when the case against the City of Miami was settled; a settlement that included Adorno & Yoss returning the fee it received.[2] *But the only period of time in which Hank Adorno was involved over those ten plus years was three days in May, 2004*: a mediation, settlement discussions with the City Manager, and the discussions with the individual clients. Thus most of the Bar's statement is irrelevant to the sanctions issue.

Since both sides agreed that the facts of the ten year process were undisputed,

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[2] *See* Appendix of Exhibits to Statement of Undisputed Facts, Exhibit 22.

we address the Bar's Statement of Facts to point out the Bar's failure to focus on *Hank Adorno's conduct*; conduct that was obviously "knowing" in the active sense, but was *not* "knowing" in the context of whether ethical rules were intentionally violated, assuming *arguendo* that any rules were violated. Therefore we turn to the Bar's "facts" to point out where they miss the Adorno "knowing violation" factual mark.

2. The Bar's "Facts"

(a). "Background." Bar Brief, pp. 2-4. Adorno had no role in the process, or the retainer agreement, by which the individual plaintiffs and their organization, Tenant & Taxpayers United for Fairness, Inc. ("TTUFF") retained the Atlas Pearlman law firm. Nothing in the Bar's "Facts" suggests otherwise.

(b). "Plaintiffs Pursue Class Certification." Bar Brief, pp. 4-8. Adorno did not handle any part of any motion, hearing practice or any of the pleadings on the class certification. The Bar's "facts" demonstrate that Mitchell Bloomberg and Robin Campbell of the Adorno & Yoss firm, the experienced class action litigators, were in charge.

(c). "Non-Disclosure Agreements." Bar Brief, pp. 18-20. The Bar's "facts" reflect that Bloomberg, not Adorno, was the person responsible for that process. Adorno did not negotiate, draft or communicate with the City relating to

non-disclosure.

(d). "City Commission Approval." Bar's Brief, pp. 22-23. Adorno, as

the "facts" show, played no role in the City Commission approval process.

(e). "Adorno & Yoss Opposes New Plaintiffs' Intervention." Bar's Brief, pp. 24-30. The Bar's "facts," including multi-page quotations of trial court colloquies, show that Adorno played absolutely no role in those February 2005 proceedings. Mr. Bloomberg, not Adorno, appeared, argued and did the written submissions on the subject of whether intervention was necessary.

* * *

The only portions of the Bar's "facts" relevant to whether Hank Adorno "knowingly violated" any Rules Regulating the Florida Bar and the appropriate sanction if he did, are the "May 24, 2004 Mediation" and the "May 26, 2004 Refund Trial," and the "Respondent Brokers a Deal with the City Manager." Bar Brief, pp. 9-15.

As to those events in three days in May, there is no dispute that Adorno went to the mediation thinking that it was an attempt to settle the case for the as yet uncertified class;[3] that the mediator, Henry Latimer suggested individual

[3] The Referee asked Adorno about the fact that in doing so he was

settlement after learning the class had not been certified and Adorno asked Bloomberg if that was permissible and Bloomberg, as an experienced class action litigator (which Adorno was not), said "yes," as long as we don't prejudice the class."[4]

There is no dispute that the City Manager was uninformed as to the City's liability, and mistakenly informed by the Assistant City Attorney and City Attorney that an individual settlement would preclude a class refund. The four pages of Adorno's testimony that are quoted by the Bar (Bar Brief, pp. 11-14), reflect that Adorno said nothing detrimental to the class or the class action, and, while omitted by the Bar, the fact is that Adorno did not know that the City believed (wrongly) that an individual settlement would create a statute of limitations bar to the class. *See* Adorno Hearing, Exhibit 10; Adorno Exhibit H to

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"representing the interests of the class," and Adorno explained the context, that the trial judge "had asked us to come up with a class number," that the effort was "to try to determine what the class number would have been at mediation." Adorno continued: "When I gave that number to Judge Latimer, if we put it in context, we went into the office, Judge Latimer said what's your number? I said, 35 million. The City said, no authority. Okay. Those negotiations were over . . . . If Judge Latimer would not have asked the question about individual settlement . . . mediation would have been over . . . ." Sanctions Hearing, Vol. 2, pp. 169-173. Adorno knew that he was trying to assist the interest of the class, but "I did not believe that the putative class was a client." *Id.* at 170.

[4] The Bar omits those facts, but they are part of the undisputed testimonial record on which the Referee relied. *See* pp. 9-14, *supra*.

Motion for Summary Judgment, Letter of City Special Counsel, stating that the Assistant City Attorney and the City Attorney were wrong as a matter of law as to the effect of any individual settlement on the right of the class to proceed and on any potential prejudice to the class.

Finally, the Bar's "Respondent Seeks to Represent the City" "facts" (Bar Brief, pp. 20-22) reveals Adorno's grasp of law, ethics and a commitment to the class when it was ultimately certified. The quoted Adorno testimony reflects his understanding of how the City could recoup the millions it would have to pay the class *via* a lawsuit against the company that misadvised it about the propriety of the fees charged property owners. The Adorno testimony was adamant about the need to obtain conflict waivers if Adorno & Yoss undertook that representation for the City. The contingent representation of the City that was spoken of between Adorno and the City Manager would have had value *only if the class was compensated*; the individual settlement was not the *raison d'etre* of the proposal because it was only a fraction of the sum due the class, and Adorno's offer would have benefitted the class and the City if, as he made clear, conflicts were knowingly and intelligently waived.

In sum, the Bar's Statement of Facts supports Adorno here on two fronts. Much of what is contained in the Bar's Statement (and in the facts set forth in the

Mazstal opinion), do not address Adorno's individual actions and are therefore not evidence of *his* conduct. And where the facts do relate to Adorno, they show no clear and convincing evidence of knowing, let alone intentional, violations of any rules. What they do show is a lawyer seeking the best possible result for his actual individual clients and for the putative class he had not yet been authorized to represent.

SUMMARY OF THE ARGUMENT AS TO SANCTIONS

The Referee's recommendation as to sanctions should be affirmed (if there were any rule violations) because it is supported by overwhelming, uncontroverted evidence that Adorno could not have "knowingly" violated any rule or duty. The Referee utilized the appropriate discipline standards. Adorno's conduct was not a knowing or intentional violation of any firmly established rules. Indeed, he acted consistently with established law. The Bar's effort to categorize Adorno's efforts regarding individual settlements as "knowing" misunderstands the difference between knowing that one is acting, and knowing that one's actions are improper. Adorno's actions fit the former definition, not the latter. The fact that the Referee recognized that the law is in conflict regarding any fiduciary duty to an uncertified putative class supports the conclusion that Adorno's conduct must be viewed, at most, under the negligence, not "knowing" Sanction Standard. Thus, if there was a rule violation, a public reprimand was the proper sanction under the applicable standards.

ARGUMENT AS TO SANCTIONS

ASSUMING *ARGUENDO* ANY RULE VIOLATION, THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND SHOULD BE AFFIRMED

The Referee recommended a public reprimand. He wrote this about Hank Adorno:

> Few attorneys could summon a more prestigious cross section of the community to testify on one's behalf. The Respondent exemplifies a dedication to pro bono work together with substantial contributions to those less fortunate in the Miami Dade Community. The Respondent should be commended and recognized for his substantial lifetime dedication to pro bono work, charities, and the betterment of his community.

Appendix A, Report of Referee, p. 7.

The Bar seeks a six month suspension claiming that Adorno's acceptance of the

settlement offered by the City to the individual plaintiffs – before there was any certification of a plaintiff class – was a knowing conflict of interest and a knowing "violation of a duty . . . ." Bar Brief, p. 43. The Bar overlooks the Referee's acknowledgment that the question at the heart of this case – exactly what duty is

owed

to a putative class – is (to put it mildly) far from clear:

> The Referee would be remiss if it did not comment on the conflicts in the law in this area. The Affidavits filed in support of Adorno's Motion for Summary Judgment and other supporting cases do create a conflict as to what fiduciary duty is owed to an undetermined or putative class by lead counsel. The Florida Supreme Court will ultimately resolve any conflict.

Appendix B, Final Order on the Bar's Motion for Summary Judgment and Respondent Charles Mays' Motion for Summary Judgment and Respondent Henry Adorno's Motion for Summary Judgment, pp. 8-9. Adorno's Initial Brief on Cross-Appeal, *infra*,

explains why, given the applicable legal principles, there was no breach of fiduciary duty, and no current client to whom such a duty was owed because putative class members are not, as a matter of law, a current client.

As we demonstrate below, the Bar's submission on the recommended sanction

is without merit. The Bar's effort to describe Adorno's conduct as knowingly improper

is belied by the undisputed facts. The Bar's case law submissions regarding duties to

a putative class (*Hawaii v. Standard Oil*, 405 U.S. 251 (1972) and *Shelton v. Pargo*,
582 F.2d 1298 (4th Cir. 1978)) are completely inapposite. The discipline decisions of
this Court offered by the Bar actually bolster Adorno's position: no more than a public reprimand was appropriate, *if* there were any violations of the Rules Regulating the Florida Bar.
And, as we show in the Cross-Appeal, there were no violations of any Rule Regulating
the Florida Bar.

THE DISCIPLINE STANDARDS AND THE CASE LAW

The Bar seeks a suspension under Standards for Imposing Lawyer Sanctions 4.32 (knowing conflict of interest) and 7.2 (knowing conduct violating a duty, causing
injury to a client, the public, or the legal system). The Bar complains that the Referee
should not have utilized Standards 4.33 and 7.3, which address negligent conduct. Bar's Brief, p. 5. Given the Referee's belief that the "duty" to an undetermined, uncertified, putative class is rife with uncertainty and unsettled and that this Court

"will ultimately resolve any conflict" (Appendix B, pp. 8-9), it is difficult to see how anyone could "knowingly" violate a law or rule that is unknown. The cross-appeal *infra*, illuminates that, but here we address each of the cases offered by the Bar and show why they are not applicable and do not support *any* suspension.[5]

We address the cases, one by one.

In *Florida Bar v. Rodriguez*, 959 So. 2d 150 (Fla. 2007), Rodriguez's firm had

a secret $6,445,000 engagement agreement with DuPont at the same time it was negotiating with DuPont to settle claims for clients who had sued DuPont. The Court wrote this about Rodriguez's actions which included holding back money paid to his clients to insure they complied with the demands of his secret (to them) other client, i.e., Dupont:

> [H]e engaged in actions that directly conflicted
> with the interests of his clients. He became an
> agent for DuPont while still representing his

[5] Perhaps recognizing the inaptness of their cases, the Bar seeks to temper their use by suggesting shorter suspensions than those imposed in the offered cases. Bar Brief, pp. 46-47. But the problem with their cases is not the duration of the suspensions, it is the fact that the disciplines in those cases were for violations of well established principles of attorney conduct, not conduct that was clearly authorized (at best) or (at worst) unaddressed by Florida law.

> Benlate clients against DuPont . . . . Thus, Rodriguez was representing adverse interests because he was on retainer to DuPont during that two-year period.

Id. at 160. Rodriguez "was a knowing party to the engagement agreement [with DuPont]. He did not disclose the conflict of interest to his clients." *Id.* The rule Rodriguez violated "*was firmly established* by the time Rodriguez entered into the engagement agreement . . . . Further the rule is *clear and unambiguous* in its language: . . . 'a lawyer *shall not* participate in offering or making . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." *Id.* at 161 (emphasis supplied). Rodriguez was also ordered to disgorge the prohibited fee he received "[b]ased on the *clear language* in rule 3- 5.1(h) and case law." *Id.* at 162 (emphasis supplied).

Thus *Rodriguez* is based on firmly established rules and case law that was clear, using plain, mandatory ("shall not") language. That is a far cry from this case, where the unrebutted evidence is that a possible, newly announced implied duty to an uncertified class was not firmly established, was not clear, and was not stated by any extant Florida case law.

Jeffrey Herman's misconduct – representing clients with directly adverse

interests and conducting business transactions knowingly adverse to a client – were also violations of clearly stated rules: "a lawyer shall not represent a client if the representation of that client *will be directly adverse to the interests of another client* . . . ." The *Florida Bar v. Herman*, 8 So. 3d 1100, 1104 (Fla. 2009) (emphasis in original). There too, the prohibitions were mandatory ("shall not"), and firmly established, and, like *Rodriguez*, involve *actually retained individual clients*, not unknown, unnamed, uncertified potential members of a class of persons.

The Bar's final "applicable" case – The *Florida Bar v Carlon*, 820 So. 2d 891 (Fla. 2002) – is, in the Bar's own words, "not directly on point." Bar Brief, p. 47. The Bar writes that *Carlon* "demonstrates this Court's willingness to impose a rehabilitative suspension for violations of Rule 4-1.5 (excessive fees) . . . ," but the Bar does not point out that *Carlon* was a serious repeat offender both as to excessive fees and other violations going back to 1987. *See Carlon*, *id.* at 899, n.7, citing Carlon's public reprimand in 1987 for billing, suing and garnishing a condominium association bank account in contravention of an express promise not to do so (*Florida Bar v. Carlon*, 505 So. 2d 1325 (Fla. 1987)); his admonishment for minor misconduct in 1996, and his indefinite probation for not paying the restitution ordered in the admonishment case (*Florida Bar v. Carlon*, 727 So. 2d

912 (Fla. 1999)).

Adorno is no Carlon. Carlon apparently had a substantial lifetime dedication to overcharging clients. The Referee commended Adorno for his substantial lifetime dedication to *pro bono* work, charities and the betterment of his community." Appendix A, Report of Referee, p. 7. His recommendation had a principled basis and

is bolstered by the *Florida Bar v. Vining*, 707 So. 2d 670, 673 (Fla. 1998) principle that a "referee's disciplinary recommendation is presumptively correct and will be followed unless clearly off the mark."

The Referee was not off the mark in recognizing that Adorno's acceptance of the City's offer to settle with the named plaintiffs occurred against a backdrop of unsettled law. Appendix B, p. 9. The Referee was not off the mark in finding that although Adorno is an "experienced attorney, he was not experienced in handling class actions."

Appendix A, p. 7. The Referee was not off the mark in finding that Adorno had been

completely forthcoming in the Bar proceedings. The Referee was not off the mark in recognizing that the opinion vacating the individual settlement in *Mazstal v. City of Miami*, 971 So. 2d 803 (Fla. 3d DCA 2007) did not determine the issues

before him.[6]

The Referee carefully tracked the applicable standards for imposing discipline

and clearly articulated his reasons for recommending a public reprimand. Obviously Adorno "knowingly" advised his clients that they could accept the City's offered settlement, but that does not render his decision to be a "knowing" violation of a duty, or a "knowing" violation of conflict of interest or fee rules. The payment offered to the law firm's named plaintiff clients by the City was

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[6] The Bar quotes (but does not cite) *Mazstal*, saying that there the court relied "upon a series" of cases expounding on the nature of a fiduciary duty. Bar Brief, p. 31. The decision in *Mazstal* does not cite to any Florida case relating to a duty *vis a vis* an uncertified class, and it focuses on Adorno & Yoss, the firm, not the particular decisions made by Mr. Adorno. The decision does contain strong statements, but Adorno was not a party to the case and, like the Bar's Brief here, *Mazstal* speaks of
post-settlement matters in which Adorno had no part. *See* Bar's Brief at 18 (the nondisclosure agreement and written exchange involving an Adorno & Yoss partner, Mitchell Bloomberg); Bar Brief at 24-30 (the February 2005 intervention hearing and
the colloquies of Mr. Bloomberg with the trial court and the memorandum of law submitted by him, not Mr. Adorno). *Mazstal*, in addition to not involving Adorno as
a party, was decided under a different burden of proof, and its conclusion that there is
an "*implied* fiduciary duty" to a putative class (971 So. 2d at 809) (emphasis supplied)
confirms the unsettled nature of the question and the difficulty of finding clear and convincing evidence of a "knowing violation." We address *Mazstal* in more detail *infra* at pp. 43-46.

extravagant, but what Adorno did not know was that the City (incorrectly) thought paying those plaintiffs would finesse any obligation to the as yet uncertified class; a class that the firm protected in the individual settlement agreement and was committed to pursuing relief for once certified. The City's Special Counsel, hired to advise the City on the consequences of its payment to the named plaintiffs, was unequivocal in his opinion that the City's strategy was wrong: "[t]he settlement did not moot the class claims" and "there is no apparent prejudice to the class" by virtue of the settlement. *See* Adorno Motion for Summary Judgment, Exhibit H, the March 24, 2005 post-settlement opinion letter to the City from Special Counsel Thomas Scott. *See also*, pp. 40-41, *infra*, the Cross-Appeal portion of this Brief.[7]

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[7] The City's Special Counsel's view was consistent with Robin Campbell's explanation of the benefits of the settlement:

> I thought it was a great settlement for everyone involved and the putative class. As far as our individual clients, yes, it was, as everyone has referred to, a substantial windfall. It was far more than the amount they would have gotten as members of the class once it was certified. But in addition, there was $400,000 of that money that was going to TTUFF, which the purpose for which was to fund the referendum, [to require voter approval for assessments] which was their goal from the outset of this.

Sanction Hearing, Vol. 2, p. 95.

Against that backdrop of the City's mistaken, and unknown to Adorno, view of the consequences of its offer, the acknowledged unsettled nature of the duty owed to the putative class members, Adorno's reliance on the advice of his partner who was lead counsel in the case and experienced in class litigation, and Adorno's sterling record of public service and good character, the Referee's sanction recommendation should be affirmed if the Court affirms the recommendation regarding rule violations.

In the cross-appeal we contend that the rule violation findings *should not be affirmed*, but if we do not persuade the Court on that front, the facts and the law favor affirmance on the sanctions issue because the Referee's recommendation has a more than reasonable basis in the case law and the Standards for Imposing Sanctions. *See Florida Bar v. Bitterman*, ___ So. 3d ___, 2010 WL 652978, *2 (Fla. 2010), citing *Florida Bar v. Temmer*, 753 So. 2d 555, 558 (Fla. 1999), which in turn quotes *Florida Bar v. Lecznar*, 690 So. 2d 1284, 1288 (Fla. 1997) (the Court "generally . . . will not second guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law.").

CONCLUSION

If there was any rule violation, the Referee's sanction recommendation should

be accepted.

INITIAL BRIEF ON CROSS-APPEAL, SEEKING REJECTION OF THE RECOMMENDATION THAT RULES WERE VIOLATED

SUMMARY OF THE ARGUMENT AS TO RULE VIOLATIONS

There was not any violation of Rule 4-1.7 (Conflict of Interest; Current Clients) because the members of the putative class, the as yet uncertified class, were not Adorno's current clients as a matter of law. The Bar does not offer any case that says otherwise. As one, unrebutted, expert (Sanford Bohrer) said, "[u]ntil there's a formal certification, you do not represent anyone but the named plaintiffs; that's the ABA rule, the federal rule, and the State of Florida Rule." Exhibit D to Adorno Summary Judgment Motion. *See also, Schulte v. Angus*, 14 So. 3d 1279, 1280 (Fla. 3d DCA 2009) ("Indeed no court has applied rule 4-1.7 to cases involving any individual or entity that is not a current client").

There was not any violation of Rule 4-8.4 (Misconduct) because there was no firmly established, clearly stated Florida rule regarding any fiduciary duty owed to uncertified, putative class members which would preclude an individual settlement. The Referee recognized that fact. The expert testimony, including the Bar's, left no doubt as to the State of Florida law on the subject. The newly coined concepts of "implied fiduciary duty," and "implied obligation" to secure court

approval for individual settlements when a class has not been certified do not support a knowing violation of an unknown, newly articulated rule. And if such a duty existed, it was not breached. The class claims were not dismissed and remained (and were) viable despite the individual settlement. The recommendation of any rule violation, including 4-1.5 (Excessive Fee), should be rejected, because there was no wrongdoing.

ARGUMENT AS TO RULE VIOLATIONS

THE ACCEPTANCE OF THE SETTLEMENT OFFERED TO THE NAMED PLAINTIFFS AT A TIME WHEN THE CLASS WAS NOT CERTIFIED, WAS NOT A KNOWING CONFLICT WITH CURRENT CLIENTS OR VIOLATION OF ANY CLEARLY ESTABLISHED FIDUCIARY DUTY TO THE UNNAMED CLASS MEMBERS

A. THE STANDARD FOR PROOF OF BAR VIOLATIONS

The Referee granted summary judgment to the Bar on the breach of fiduciary duty/conflict counts which the Referee "succinctly framed" this way: "1) Did Respondent Adorno owe a duty to, or breach a duty owed to, the undetermined/putative class members when he settled with the City of Miami only on behalf of the individual plaintiffs?" *Id.* at 6-7.

All agree that the standard of proof for Bar discipline proceedings is "clear and

convincing evidence;" i.e, evidence "of sufficient weight to convince the trier of fact

without hesitancy." *In re Adoption of Baby EAQ*, 658 So. 2d 961, 967 (Fla. 1995), quoting in part *In re Davy*, 645 So. 2d 398, 404 (Fla. 1994) (emphasis supplied).

The standard of proof focuses on the facts. No one disputes the "facts" in this case, but the real question is a matter of law – do those facts clearly and convincingly

establish that Adorno "knowingly" violated Bar rules. "Knowingly" in the context of

this proceeding means a clear awareness that what was occurring was a violation of

known, established rules of law and ethics. The Referee cited a single case for the proposition that Adorno breached a fiduciary duty despite the fact that the class had not

been certified and the putative class members were not, as a matter of law, his clients. The fact that the putative class members were not his clients should end the matter as to Rule 4-1.7, which is captioned "Conflict of Interest; Current Clients,"and is founded on the presence of actual clients: "the representation of 1 client will be directly adverse to another client." *See* 4-1.7(a)(1), (2). *See Schulte v.*

Angus, supra, p. 32.

The one case offered by the Referee – *Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978), and echoed by the Bar – cannot support the conclusion that Adorno knowingly violated any law, or ethics rules. Age alone does not disqualify *Shelton*; as we show below it rests on a foundation eroded by amended federal rules and a concern for conduct that did not occur here.

B. THERE WERE NO VIOLATIONS OF FIDUCIARY DUTIES AND NO ETHICAL VIOLATIONS

Shelton v Pargo cannot be the basis for finding that Adorno violated a fiduciary

duty and/or that his actions violated any rules regulating the Florida Bar. *Shelton v. Pargo* addressed "the procedure to be followed by a district court in passing upon a *voluntary motion to dismiss an action*, filed both as an individual and a class action, when the individual action has been settled without court approval in advance of any certification of the action as a class action under Rule 23(c)(1), Fed. R. Civ. P." *Shelton*, 582 F.2d at 1300 (emphasis supplied).

There was no "dismissal" involved in the settlement here. That clearly distinguishes *Shelton* from this case. The City of Miami's Special Counsel, in his post-individual settlement opinion letter, left no doubt that the individual settlement did not dismiss the case and did not compromise the viability of the class action. He wrote:

> [W]e do not believe under either Florida or federal law the refund claims of the precertified class members have been mooted.
>
> * * *
>
> However, the Partial Release executed by

> the
> named Plaintiffs in December, 2004 only releases the City from any further actions of the named Plaintiffs on the refund portion.
>
> * * *
>
> From a legal standpoint, there is no Florida or
> federal statute, rule or case which supports the
> argument that the refund portion for the entire
> class was settled.

Adorno Motion for Summary Judgment, Ex. H, pp. 14-15.

In addition, subsequent to *Shelton v. Pargo*, Rule 23 (c)(1) was amended in 2003 to make it clear that a court's duties *vis a vis* "class action settlements" do not apply *until a class has been actually certified*. Florida law parallels the Amended Rule 23. *See* Rule 1.220(e), Fla.R.Civ.P.:

> **(e) Dismissal or Compromise:** *After a claim*
> *or defense is determined to be maintainable on behalf of a class under subdivision* (d), the claim or defense shall not be voluntarily withdrawn, dismissed, or compromised without approval of the court after notice and hearing. Notice of any proposed voluntary withdrawal, dismissal, or compromise shall be given to all members of the class as the court directs. (emphasis supplied).

The American Bar Association Formal Opinion 07-445 confirms that pre-certification a lawyer does not represent putative class members:

> Before the class has been certified by a court, the lawyer for plaintiff will represent one or more persons with whom a client-lawyer relationship clearly has been established. As to persons who are potential members of a class if it is certified, however, no client-lawyer relationship has been established. *A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired*. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, *putative class members are not represented parties* for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period (emphasis supplied).

Thus, under Florida law, federal law, and the Model Rules regarding class actions, the putative class members *were not Adorno's clients*, and the settlement for

the individual named plaintiffs, which left the class action in place and *did not call for*

dismissal of the class action, was not violative of any existing duty. If the putative

class members were not "current clients," there is no Rule 4-1.7 violation. If there was no dismissal of the class action and it remained viable, there was no prejudice to the class. *See also Formento v. Joyce*, 522 N.E. 2d 312, 317 (Ill.App. 1988) ("[W]e find that defendants [lawyers for individual plaintiffs] owed no duty . . . [to] the unnamed members of an uncertified class action. . . .).

The experts were in accord. Sanford Bohrer's Affidavit in support of Adorno's Motion for Summary Judgment stated that when "Mr. Adorno participated in the settlement at issue, in my opinion, the law was clear: in state and federal courts, unless and until the lawsuit was certified as a class, the lawyer for the named plaintiffs represented only those named plaintiffs and could settle for them individually." Adorno

Motion for Summary Judgment, Exhibit D, pp. 3-4. Timothy Chinaris, the Ethics Director of the Florida Bar from 1989 to 1997, concurred: "It is my understanding that, under the legal and ethical authority existing at the time, settling the claims of individual clients as Mr. Adorno did was permissible." *Id.* Exhibit C, pp. 6-7. The Bar's expert, John Yanchunis, did not cite any Florida case in his letter supporting the Bar's position. *Id.* at 8. His reliance on *Shick v. Berg*, 2004 WL 8562986 (S.D.N.Y. 2004), which applied Texas law and spoke of a "fiduciary duty not to prejudice the interests that putative class members have in their class litigations,"

overlooked that court's finding that pre-certification Shick was not Berg's client, ruling out any conflict, and that "Shick cannot as a matter of law recover for a breach of fiduciary duty owed him as a client because Defendant Berg was not his attorney at the time of the allegedly inappropriate conduct." *Id.* at *7. Thus, no evidence, certainly no clear and convincing evidence, supported any firmly established duty that was violated by Adorno allowing his clients to accept the City's settlement.

Nevertheless, the Referee, citing *Shelton v. Pargo*, and pointing to Adorno having initially sought $35 million at mediation to settle the case for the class, concluded that settling the next day for $7 million for the seven individual plaintiffs, was a breach of "a fiduciary duty owed to the undetermined/putative class members."

Appendix B, p. 7. Although the Referee acknowledged the doubt in the area, and the

need for this Court to "resolve any conflict," the Referee believed that settling "under

the facts of this case was prejudicial, illogical, and unexplainable." *Id.* at 9. With respect, he was incorrect; the class remained viable, and the settlement was logical and

explainable because the City believed it had saved money and finessed the class action

by settling with the individuals.

C. WHY THE CITY SETTLED

There is a logical explanation for the generous settlement offered by the City. The City's motivation for offering the seven million to the named plaintiffs was its mistaken belief that by doing so the City could assert a statute of limitations defense

and avoid further liability to the class. The City Attorney's office did not understand the law. It's later hired Special Counsel did: "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties . . . . [T]he statute of limitations, once tolled, remains tolled for all members of the putative class until certification is denied." Adorno Motion for Summary Judgment, Exhibit H, pp. 19-20. The seven million dollar offer made sense to the City, and its misapprehension of the law should not lead to any finding of wrongdoing by Adorno.

Mitchell Bloomberg, Adorno's partner, knew that an individual settlement did not end the case, and responded to Adorno's inquiry regarding settlement after

the mediator suggested an individual settlement:

> A. Judge Latimer said, has the class been certified, and somebody said no. Judge Latimer said, have you thought about individual settlements? Somebody said no. Judge Latimer said, would you do that, would you talk to your clients about individual settlements?
>
> * * *
>
> A. Yeah, as we were walking out of Mr. Adorno's office, Hank turned to me and said, can we do that?
>
> Q. What did you take him to mean by that?
>
> A. I took him to mean can we settle individually.
>
> Q. What did you tell him?
>
> A. I said, yes, as long as we don't prejudice the putative class – the class's substantive rights.

Sanctions Hearing, Vol. 1, pp. 150-151; *see also* pp. 9-11, *supra*.

The City's Special Counsel left no doubt that the City's offer was not "illogical" to the City in view of its misunderstanding of the law. Special Counsel's opinion letter to the City Commission quoted Assistant City Attorney Mays' memo in support of City approval of the amounts agreed to: "'[i]n view of

an exposure of $24 million, the City Manager and the City Attorney were able to negotiate this proposed settlement with the named plaintiffs. **Because of the passage of time, no other property owner will be able to maintain a refund action against the City.**"' Motion for Summary Judgment, Exhibit H, p. 15. (emphasis in Special Counsel's opinion letter). Special Counsel noted that the memo also received the separate imprimatur of the City Attorney: '"On November 16, 2004, an identical Memorandum was sent to the Mayor and members of the City Commission by City Attorney Jorge L. Fernandez.'" *Id.* Special Counsel made it clear that the City Attorneys were wrong on the law.

Adorno did not know that the City was willing to pay an exorbitant sum to the named plaintiffs because it thought it was saving $17 million. The misguided Assistant City Attorney/City Attorney memo was read in court by Adorno, leading to this colloquy:

> Q. When you met [City Manager] Mr. Arriola on the morning of the 26th and he offered you seven million dollars, did you know that Mr. Arriola and Mr. Mays thought they were going to finesse the class claims by paying you seven million dollars?
>
> A. No sir, I did not.
>
> Q. When you heard that seven million dollar offer from Mr. Arriola that morning, what were your choices? Could you have

said to Mr. Arriola, you're paying me too much, Joe?

A. No. That would not have been a – it's a
choice. It would not have been a choice that I would have said representing my client.

* * *

Q. So when Arriola tells you this on that Wednesday morning, the 26th, he gives you a number that you know is way out of line with the amount of the claim that each of your named plaintiffs would have, correct?

A. Yes. That number was given the night of mediation. It bore no relationship to the actual damage incurred by any of the named plaintiffs.

Q. But you were not about to tell him he's crazy.

A. No, I'm not going to do that.

Sanction Hearing, Vol. 2, pp. 119-121.

The City Special Counsel summed up the situation faced by the City: "Since we have concluded that the Intervenors and class claims have not been mooted by the settlement, and the intervention was proper, it is clear that the Court will certify the class and the City will have to defend against the refund claims on

behalf of the entire class." Adorno Motion for Summary Judgment, Exhibit H, p. 21.

That occurred, although like so much in this case, it was the product of an unusual process.

D. THE *MAZSTAL* LITIGATION AND THE THIRD DISTRICT DECISION

The decision in *Mazstal v. City of Miami*, 971 So. 2d 803 (Fla. 3d DCA 2007),

recounts the City's trial court effort to set aside the settlement "on the grounds of unilateral mistake and public policy," and the testimony of City Commissioners and the City Attorney that they "believed the settlement was for the entire class." *Id.* at 808. Mazstal was part of a "new group of property owners [who] sought to intervene as prospective class members in January 2005" and they sought to set aside the settlement

"on the grounds of breach of duty and collusion." *Id.* at 807. The trial court granted all the relief sought by both the City and the intervenors, finding unilateral mistake and that there "was an *implied* class action requiring judicial approval of the individual settlement . . . ." *Id.* at 808 (emphasis supplied).

The Third District affirmed, but chose to rest its affirmance on "the parties'

breach of fiduciary duty" (*id.* at 808): "Both the original plaintiffs and Adorno & Yoss breached their fiduciary duty to the class." The Third District followed that statement with just one case: "*Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978)", and concluded "at the least, there was an *implied* fiduciary relationship between . . . Adorno

& Yoss, and the class." *Id.* at 809 (emphasis supplied). Judge Cortinas' concurrence was harsh: "It was a case of unchecked avarice coupled with a total absence of shame on the part of the original lawyers . . . . More unethical and reprehensible behavior by attorneys against their own clients is difficult to imagine." *Id.* at 811 (Cortinas, J., concurring). Nowhere in *Mazstal* is there any explanation of how or why the putative class members were Adorno & Yoss' "own clients."

We have made the point earlier that neither the *Mazstal* use of the *Shelton v. Pargo* fiduciary duty dictum, nor the court's Adorno & Yoss criticism, resolve anything about Mr. Adorno's personal, individual, responsibility *vis a vis* specific Bar rules. *See* p. 29, n.5, *supra*. That is critical, because reading *Mazstal* makes it easy to jump to a malignant conclusion about Adorno, over looking the fact that Adorno was not a party to *Mazstal* and *Mazstal* was not a Bar proceeding.

The strict scrutiny that must be given in Bar proceedings yields a more

benign result. The trial court's "implied" requirement of judicial approval of individual settlements; the *Mazstal* putative class "implied fiduciary duty" citing a 1978 federal Fourth Circuit case; Judge Cortinas' assertion that Adorno & Yoss acted "against their own clients," shows that *Mazstal* created concepts that were unknown and unstated in Florida when Adorno's conduct occurred. Sanford Bohrer, a class action expert, said:

> In my opinion, the *Mazstal* court has sub silentio amended
> Rule 1.220 to read as follows:
>
> > After a claim or defense is determined to be maintainable on behalf of a class, under subdivision (d), **or if "class certification was inevitable,"** the claim or defense shall not be voluntarily withdrawn, dismissed, or compromised without approval of the court after notice and hearing.
> >
> > . . . [The]language which forms a necessary premise for the court's holding . . . has no Florida precedent to my knowledge and was not the law when Mr. Adorno engaged in the conduct at issue.

Adorno Motion for Summary Judgment, Exhibit D, pp. 3-4 (emphasis in original). Messrs. Chinaris and Jarvis echoed the ethical and legal concern for punishing a lawyer under unstated standards: "The imposition of discipline for violation of a duty that was not declared until after the underlying conduct occurred would thus

raise substantial *ex post facto* and fairness questions and would be inconsistent with the fundamental tenet that 'The Rules of Professional Conduct are rules of reason.' *See* Preamble to Florida Rules of Professional Conduct."' *Id.*, Exhibit B, pp. 3, 14. Chinaris' expert opinion also cited the Preamble and concluded that "[a] lawyer should not be exposed to disciplinary action because a court subsequently adopted a different position." *Id.*, Exhibit C, pp. 6-7.

The Referee referred to those affidavits (and implicitly, by citing *Sheldon v. Pargo*, the lack of any Florida case law), saying there is "a conflict as to what fiduciary duty is owed" (Appendix B, p. 8), but the "totality of the circumstances" tipped the scale for him. *Id.* at 9. That phrase suggests that it was the *gestalt* of the goings on that influenced the Referee, just as it influenced the original trial court and the *Mazstal* court. Indeed, the Bar's Statement of Facts contributes to a *gestalt* driven view of the matter, a view that fails to focus solely on Hank Adorno. Properly focused, the view is different.

Adorno did not initiate the individual settlement concept; the experienced mediator, Henry Latimer did. Adorno was not responsible for the trial court's postponement of class certification. Adorno had no involvement in the actual trial litigation, other than contributing to formulation of the damages model. Adorno had no class action experience. Adorno asked and relied upon Adorno &

Yoss lawyers who did have such experience. At the mediation, mediator Latimer did not warn against individual settlements; he promoted the concept.[8] Adorno had no knowledge of the City's strategy. Adorno had no involvement in the non-disclosure agreement and did not exchange letters with Assistant City Attorney Mays with regard to that. Adorno had no involvement in the refund case after May 26, 2004. Adorno had no involvement with the post February 2005 memorandum submitted by Adorno & Yoss regarding intervention by new class representatives. Adorno did not "prejudice" the class action; it was preserved and protected by the limited releases, the standstill agreement and the continued viability of a class notwithstanding the individual settlement.

The Bar's Statement of Facts and the *Mazstal* decision, use a broad brush to paint the story of the settlement. But the question of whether there was clear and convincing evidence of a knowing violation of Rule 4-1.7(a) (Conflict of Interest; Current Clients) and Rule 4- 8.4 (Misconduct) must focus on what Hank Adorno did, not what other Adorno & Yoss lawyers did, or the mistakes made by

[8] The late Henry Latimer was a paragon of ethical lawyering. He would not suggest a course of action that transgressed ethical concepts. The uncontroverted fact of his suggestion of individual settlements underscores all the reasons why Adorno committed no knowing violation of any ethical rule. Judge Latimer thought it proper, Bloomberg knew it to be proper, so how could Adorno know that he was violating any rule or duty by allowing his clients to accept the City's offer.

the City and its attorneys. If the putative class members were not Adorno's "clients," then there can be no violation of 4-1.7. If the law as to "fiduciary duty" to an uncertified class was not clearly established by Florida law; if such duties are newly determined to be "implied," and if there is an "implied" obligation (despite the clear language of the Rules of Civil Procedure governing class actions) to seek trial court approval for individual settlements in an as yet uncertified class action in which the class portion will remain viable, then those newly articulated duties cannot be the basis for a 4-8.4 "Misconduct" violation because the duties were not "firmly established," nor were they "clear and unambiguous." *Cf, Florida Bar v. Rodriguez*, 959 So. 2d 150, 161 (Fla. 2007).

Finally, if there were no violations of those rules, there was no 4-1.5 excessive fee violation. The Referee hinged his excessive fee recommendation on his breach of fiduciary duty/prejudice to the class view: "As a result of Respondent's prejudice to the class, it follows Respondent took an excessive and indefensible attorney fee." Appendix A, p. 9. The Adorno & Yoss fee of $2 million was less than one-third of the $7 million settlement. If there was no clear and convincing evidence of any knowing violation of ethics rules, such a fee was not excessive. Indeed, Adorno & Yoss agreed that the fee would be credited for the benefit of the future class against any fee awarded by the Court after

certification and the class claim satisfaction. Adorno Statement of Undisputed Facts, ¶63.

That point is telling. It confirms the fact that the Firm intended to proceed on behalf of the class. It confirms that there were still substantial monies due to the class and the Firm's financial interests would be best served by continuing the litigation to seek the $23 or $24 million (or more) that was there for taking. The record reflects why new class representatives were not promptly brought on board after the City paid the first part of the settlement in late 2004. Mr. Bloomberg, who was the partner in charge and primarily responsible for the case, was asked why he did not move in December 2004 to complete the refund issue. His answer was "[h]ealth;" his stage four lung cancer had returned, "[so] I was in Rochester, New York from November 16th to December 24th getting radiation and chemo . . . ." *Id.*, p. 171. Adorno had no involvement after May 2004, and was unaware of the February 2005 intervention proceedings. *Id.*, Vol. 2, pp. 134-135.

The Referee extensively questioned Mr. Adorno about various aspects of the settlement, (Vol. 2, 169-189) leading to this colloquy:

> Q. [The Court]: But then what obligation did you owe to them [the putative class.]
> A. Well, I did not know of any obligation, that's why I asked the question [of Bloomberg]. The obligation that both of my partners told me – and since then I have

> become a class action expert over the last five years – is an obligation that we cannot prejudice the substantive rights of the putative class, and that, my understanding, now having participated in the actual research, but Mitch [Bloomberg] and Robin [Campbell] knowing back then, meant that we could not do anything that would preclude that class from prosecuting their claims.
>
> * * *
>
> That could not and did not happen in this case because we never agreed to dismiss it.

Id., p. 185.

If Adorno was wrong as to that, he was not knowingly wrong. He believed individual settlements could occur pre-class certification. That a class would have been ultimately certified is clear, but no clearly established plainly stated rule of law or ethics prevented him from relying on the advice of his knowledgeable partners. The fact that the City of Miami agreed to pay an exorbitant amount to the individuals does not change the analysis. Adorno cannot be hoisted on the petard of the City's petulance about its unilateral mistake and be found to have acted unethically under unknown rules and duties.

CONCLUSION

The Referee's recommendation that Hank Adorno violated Rule 4-1.7, 4-8.4 and 4-1.5 should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Federal Express this 16th day of June, 2010 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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