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

REPLY ON CROSS-APPEAL

ANDREW S. BERMAN
YOUNG, BERMAN, ET AL.
17071 West Dixie Highway
North Miami Beach, FL 33160
Ph: (305) 945-1851

BRUCE S. ROGOW
CYNTHIA E. GUNTHER
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
Ph: (954) 767-8909

Counsel for Respondent

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I.
THE COURT SHOULD REJECT THE REFEREE'S RECOMMENDATION THAT ADORNO VIOLATED ANY RULE REGULATING THE FLORIDA BAR

A. *ST. LOUIS* SUPPORTS ADORNO

The Bar relies on two cases: *Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978) and *Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007). We discuss below why they support Adorno's argument that he did not violate any ethical rules.

As to *St. Louis*, the Bar says "Respondent cannot abdicate responsibility for his actions by stating that he relied upon the advice of others." Bar Answer and Reply Brief, p. 18. But *St. Louis* refers to relying on the "ethics" advice of others, not substantive law advice – which in this case was asking experienced class action lead counsel whether Judge Latimer's individual settlement suggestion (after class wide discussions resulted in an impasse) was proper as a matter of class action law. Having been advised that it was, and considering that Judge Latimer suggested it knowing that the class was not yet certified, Adorno was entitled to rely on the advice he received. How could he have known that individual settlements might years later be viewed by anyone as unethical when he

had been assured that such settlements, pre-class certification, were legally proper?

St. Louis refers to Rule 4-5.2(a) of the Rules Regulating the Florida Bar ("Responsibilities of a subordinate lawyer"), and the Court quoted a Colorado case's comment that a lawyer "may not delegate that duty or responsibilities [to know the rules of discipline] to another . . . ." 967 So. 2d at 118, n.3. Adorno relied on *rules of law advices*. Indeed, if *St. Louis* has any currency here it favors Adorno, who, the referee found was not experienced in class action litigation, and who followed the suggestion of Judge Latimer and the advice of lead counsel, Mr. Bloomberg and Ms. Campbell. The Comment to Rule 4-5.2, speaking of subordinates, says that following a supervisor's directions to file a frivolous pleading would not be a rule violation "unless the subordinate knew of the document's frivolous character." While Adorno was not a "subordinate," the analogy is apt; Adorno had complete confidence in Bloomberg and Campbell, so relying on their advice after Judge Latimer suggested individual settlements, falls squarely within the Rule 4-5.2 Comment's exculpatory doctrine. Adorno did not know pre-certification settlement, which he was told by lead counsel in the case was legally permissible, could ever be viewed as a disciplinary rule violation.[1]

[1] None of the four experts, including the Bar's single expert, saw any

The Bar's reliance on *St. Louis* proves two points. First, the Bar recognizes that Adorno *did* rely on the substantive law advice of knowledgeable lawyers. That negates

any intent to act inappropriately. Second, the Bar's misuse of *St. Louis*'s principle is emblematic of the Bar's misunderstanding of the importance of Adorno seeking advice of experienced counsel after Judge Latimer broached the individual settlement subject. *There would have not been any individual settlement, or any discussion of it, were it not for the undisputed fact that Judge Latimer initiated the idea*. Paragraph 42-43, Adorno Undisputed Facts; Robin Campbell Affidavit (Exhibit J to Motion for Summary Judgment, paragraphs 41-44). So when one looks at the "totality of the circumstances on judging Respondent's conduct" (Bar Brief at 13) and the "unique facts of this case" (*id.* at 16, n.3) and the admonition that "an attorney's conduct cannot be viewed in a vacuum" (*id.* at 7), the genesis of the individual settlements concept and the

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disciplinary rule violated by a pre-certification individual settlement. Even the Bar's expert opined that "the ethical obligations of a lawyer representing a putative class, that is a class that has not been certified, *arises not from the Rules Regulating the Florida Bar*, but instead from a collection of federal cases." *See* Respondent's Exhibit 3 (emphasis supplied). *See also* Respondent's Exhibits 1, 2, and 4. We discuss *infra* why the federal cases favor Adorno too. Indeed, one cannot read Rule 4-1.7 or any rule of procedure, as placing a lawyer on notice that a putative class is a "current client" pursuant to conflict rules. Therefore the Referee's finding that Rule 4-1.7 was violated by breaching a fiduciary duty to an

confirmation of the lawful propriety of such settlements, are vitally important. Adorno's reliance on that duality of advices is not precluded by *St. Louis*; its reference to Rule 4-5.2(a) and the Rules' Comment that a lawyer must *know* of the impropriety of the act in question, actually exonerates Adorno.

The Bar's attempt to deflect as "wholly irrelevant" other undisputed facts – that Adorno did not know why the City was willing to pay, or that the City had "a logical reason for paying an exorbitant amount" (Bar Brief at 19) – is another example of the Bar's attempt to circumvent the fact that Adorno did not initiate the individual settlement idea. Judge Latimer, who knew that a class was awaiting certification, planted the seed; lawyers Bloomberg and Campbell blessed the ground, and the City richly fertilized it, thinking (incorrectly and unbeknownst to Adorno) that the "class" would not grow. How can the Bar say that the "City's rationale has no bearing" on the case. *Id.* at 20. If the individual settlements had been in line with the individual claims, we would not be here, so the fact that Adorno had no idea that the City had its reasons for overpaying is highly relevant.

What was Adorno to do when: (1) Judge Latimer suggested individual settlements; (2) class action experts said that was legally proper; (3) the City then offered to pay more than the individual claims were worth for reasons Adorno did

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undetermined class is devoid of any legal support.

not know; (4) the clients said yes and instructed Adorno to accept the offer; and (5) the class claim was still viable? Should Adorno have said to the City "you cannot pay that sum to my clients?" Should he have said to the clients "you cannot accept that sum?" Adorno did not represent the City; it was not his business to advise it against the sum. And his clients benefitted in ways that satisfied all their goals. The class action remained, the putative class benefitted; and the TTUFF goals were met.[2]

The Bar's repeated assertion that Adorno "was representing the entire class at mediation" (Bar Brief at 8, 9, 12, 14, 17), is another example of the Bar's effort to take an undisputed fact – that the mediation was to explore a number as to the amount of the City's improper fee charges (TR:136-137) – and twist it to mean that the class was a "current client." Adorno's acknowledgment that the mediation was to explore the amount of the assessment that the City had used for

[2] TTUFF's objective was to invalidate a City of Miami fire/rescue fee and foreclose further such assessments without voter approval *via* a voter initiated referendum. The suit to declare the fee invalid and to secure a refund for those assessed, was one part of the TTUFF goal. The other, mounting a referendum, was aided by the individual settlement recipients' contribution of $400,000 for the referendum costs; an organizational result that was a valuable by-product of the settlement and was unavailable through the litigation. TR: Vol. I, pp. 219, 228; Vol. II, pp. 122-125. Thus both the putative class, whose claims remained viable and unaffected by the individuals' $7 million, and who would, as a class, have the benefit of a credit for the attorney fees received from the individual settlement (TR. Vol. 2, pp. 122-125; ¶¶ 47 and 63, Adorno Undisputed Facts) and TTUFF,

emergency medical service does not equate to the putative class being a "current client," the touchstone of Rule 4-1.7. When the mediator, Judge Latimer, recognized that the City would not agree to the amount proposed for the class, he posed the possibility of individual settlements. Adorno's testimony was completely candid regarding the *raison d'etre* for attending the mediation, but he did not violate any rule when the reason for attending evaporated with the City's refusal to consider a class settlement figure, and individual settlements were proposed by the mediator.

So while, yes, Adorno, Bloomberg and Campbell went to mediation with a class in mind (at the trial judge's request), "representing the class" is a misnomer because one cannot claim the class as a "current client" until the class has been certified. "Current clients" is essential under Rule 4-1.7 ("Conflict of interest; Current Clients") and the Bar seemingly recognizes this by admitting that the Third District did not find there to be a "current client" relationship when it referred only to "an implied fiduciary duty between the original plaintiffs, Adorno & Yoss, and the class." *Mazstal v. City of Miami*, 971 So. 2d 803, 809 (Fla. 3d DCA 2007). Bar Brief at 15.[3] No "current clients," no Rule 4-1.7 violation.

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were beneficiaries of the individual settlement.

[3] We reiterate (*see* Initial Brief on Cross-Appeal at 43-44) that *Mazstal's* "Adorno & Yoss" is broader than Adorno, and that "an implied fiduciary duty" is

Simply put, there is not a scintilla of evidence or legal support for the notion that the settlement for individual clients, albeit extravagant, was in violation of Rule 4-1.7 (or any other Rule). Adorno's reliance on the suggestion of Judge Latimer and the advice of Mr. Bloomberg and Ms. Campbell that such a settlement could occur was proper and a complete defense to the charges brought against him.

B. ***SHELTON v. PARGO* SUPPORTS ADORNO**

The Bar, the Referee, and the *Mazstal* court relied upon *Shelton v. Pargo* to criticize the individual settlement as a breach of fiduciary duty. *See,* Bar Brief at 6. We addressed and distinguished *Shelton* in Adorno's Initial Brief on Cross-Appeal, pp. 35-38. *Shelton* involved *dismissal* of a potential class case by individual plaintiffs, and it pre-dated the 2003 Amendments to Rule 23(e)(2), Federal Rules of Civil Procedure, which made it clear that a court has no duties regarding any individual settlements in a putative class action until a class has actually been certified. Thus *Shelton* is no precedent for the notion that individual settlements are *verboten*. *Shelton* supports Adorno because Adorno & Yoss did not dismiss the class action; they insured that it remained viable. That is

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not Rule 4-1.7 verbiage because that rule relates to conflicts with current clients, not any implied fiduciary duty to possible future clients. *See, Schulte v. Angus*, 14 So. 3d 1279, 1280 (Fla. 3d DCA 2009); Initial Brief on Cross-Appeal, p. 32.

the heart of *Shelton*'s concern and Adorno & Yoss did not break it. The *Shelton* language seized upon by the Bar – "prejudice" and "personal aggrandizement" (Bar Brief at 6, 8) – seeks to sidestep the undisputed facts and law that leave no doubt Adorno's settlement for the individuals was not a violation of 4-1.7 ("Current clients, Conflict of Interest").[4]

The undisputed law is that no Florida or federal case has even held that a putative class is a "current client" and no Florida or federal case, and no rule of civil procedure – state or federal – precluded an individual settlement.

The undisputed facts are:

- Adorno was unaware of the City's incorrect statute of limitations reason for

[4] That is the *only* Rule (other than the excessive fee rule, Rule 4-1.5)at issue here. Rule 4-8.4 is not any basis for any sanction because the 4-8.4 allegations related to statements made to the trial judge and Adorno was found not to have violated any Rule in that regard. *See* Final Order, pp. 6, 10. The Bar's Supplemental Response to Adorno's Interrogatory #40, asking what "specific conduct . . . gives rise to "a 4-8.4 violation," pointed to "misrepresentations to the court regarding the individual nature of the settlements" and that such alleged conduct rendered the court "unable to exercise its judicial discretion . . . to take whatever measures it deemed appropriate to protect the interests of the putative class." Florida Bar's Supplemental Answers to Respondent's First Set of Interrogatories, p. 12 dated October 12, 2009. Having lost that argument below, the Bar cannot seek to shoehorn "breach of fiduciary duty" into any 4-8.4 subsection. The individual settlements did not constitute "dishonesty, fraud or misrepresentation" nor were they in any way "prejudicial to the administration of justice" as that phrase is defined. *See* Rule 4-8.4(c) and (d). Thus this case turns on Rule 4-1.7 and its focus on conflict with "current clients," and since an uncertified class is not a "current client," the Referee's recommendation must be rejected.

the large individual settlement. TR. Vol. 2, pp. 118, 122.

- Adorno was not an experienced class action lawyer. *Id.* at 128; Report of Referee, p. 6, (f).

- Adorno was instructed by his clients to accept the offer. *Id.* at ¶ 56, Undisputed Facts (Appendices 1, 3 and 4.

- Adorno did not initiate the individual settlement idea. *Id.* at 127.

- Adorno asked for advice from experienced class action lawyers, in whom he had confidence, relied on it and acted on it because he had confidence in them. *Id.* at 128.

- Adorno was duty bound to relay the City's offer to his clients. *Id.* at 120, 165.

- Adorno had no ethical duty to tell the City that its offer was too large. *Id.* at 121.

So all the Bar is left with is to wrench the words "prejudice" and "aggrandizement" from *Shelton*, but as we show below, neither word carries the weight the Bar places on it in the context of this case.

C. NO PREJUDICE/NO AGGRANDIZEMENT

Shelton's "prejudice" and "aggrandizement" phrases are not tethered to any Rule violation. No rule of discipline speaks of "prejudice" or "aggrandizement," and nothing in the Bar's Amended Complaint or Statement of Undisputed Facts can support a violation of Rule 4-1.7 for prejudice or aggrandizement. Since 4-8.4 related to "candor," and that charge is no longer in this case, (*see*, n.4,

supra), the Bar's approach is wholly *sui generis*.

The Bar admits that the class was not prejudiced by any statute of limitations problem, but says that "the class was prejudiced because their claims were abandoned in favor of those of the named Plaintiffs and a guaranteed $2 million fee for Adorno & Yoss . . . . [T]he class was prejudiced by the substantial delay in the pursuit of their claims." Bar Brief, p. 18.

But the prejudice contemplated by *Shelton* and other cases refers to eliminating class claims, not delay in their resolution. Indeed, here, it was the trial court who put off the class certification sought earlier by Adorno & Yoss. Adorno Undisputed Facts, ¶ 31; Appendices 3 and 4. *Shelton's* use of "prejudice" plainly referred to dismissal, wiping out the class, not delay. The *Shelton* court followed its prejudice/aggrandizement comment with a long quote from *Cohen v. Beneficial Loan Corp*., 337 U.S. 541, 549-50 (1949), addressing stockholder derivative suits that '"were brought off by secret settlements in which any wrongs to the general body of share owners were compounded by the suing stockholder, who was mollified by payment from corporate assets."' 582 F.2d at 1305. The court continued: "The abuse identified in *Cohen* can arise at any point after an action has been filed as a class action. It may arise as well at the precertification stage as after certification as a class action." *Id.* at 1306. Thus

Shelton's prejudice concerns were for a plaintiff doing in a class action by a settlement. That did not happen here.

That that is the "prejudice" standard is confirmed by *Zeidman v. J.Ray McDermott & Co., Inc.*, 651 F.2d 1030 (5th Cir. 1981), addressing attempts by a defendant to moot a class action by "picking off" individual plaintiffs before a class is certified:

> By tendering to the named plaintiffs the full amount of their personal claims each time suit is brought as a class action, the defendants can in each successive case moot the named plaintiff's claims before a decision or certification is reached.
>
> * * *
>
> This result is precisely what the relation back doctrine of *Sosna [v. Iowa*, 419 U.S. 393 (1975)], *Gerstein [v. Pugh*, 420 U.S. 103 (1975)], and *Swisher [v. Brady*, 438 U.S. 204 (1977)] condemns . . . .

Id. at 1050. Thus prejudice equals loss of a class' rights, not delay in asserting them, even where a defendant, similar to the City's effort here, seeks to subvert the class. A delay in getting back to the class action is not the problem, demolishing the class is.

In this case, the individual settlements did not buy off the class claims. Indeed, those settlements specifically preserved the class claim and the later hired City Special Counsel confirmed the continuing class action viability. *See* Adorno Initial Brief on Cross-Appeal, pp. 39-41.

Not only was there no "prejudice," there was no "aggrandizement." The Bar writes re aggrandizement that "Respondent could never have achieved a $7 million settlement with the City without leveraging the strength of the class claims;" that "[i]t is wholly irrelevant" that the City had a logical reason for paying an exorbitant amount to settle just the claims of the named Plaintiffs; and that "[t]he City's rationale has no bearing on Respondent's misconduct." Bar Brief, p. 19. The Bar's argument that the City's decision to overpay is irrelevant misses the whole point of what happened here. The City paid the exorbitant amount *only because it was leveraging its mistaken belief that it would finesse the class* by making such an outlandish payment. Not only is it wholly relevant, it decisively shows that *the City, not Adorno,* was trying to prejudice the class.

The Bar's skewed logic continues with its submission that Adorno's $7 million response to the City Manager's "what's the number" inquiry (Bar Brief, p. 20, n.3) somehow makes Adorno responsible for the extravagant settlement figure. Adorno merely responded; the City Manager originated the concept as part of the City's legally flawed strategy to flummox the class. Adorno was not an aggrandizer; he has suffered collateral damage from the City's aggrandizing attempt to perpetrate a coup against the class; a coup that was orchestrated by City lawyers who did not understand that their statute of limitations theory had no legal

validity. *See* Initial Brief on Cross-Appeal, pp. 39-43.

Thus, *Shelton*, properly and fairly read, does not support any rule violation. The class was not prejudiced; it remained viable and successful. Adorno did not aggrandize himself or his firm; he became a victim after the City realized its mistake and went to court to undo the settlement; an effort that led to the *Mazstal* recriminations *vis a vis* Adorno & Yoss.

II.
THE FEE WAS NOT A VIOLATION OF RULE 4-1.5

The Referee's excessive fee finding was based solely on the breach of fiduciary duty finding: "The Referee finds Respondent violated disciplinary rules of conduct in sections 4-1.7 by breaching his fiduciary duty to the undetermined putative class for pecuniary gain and by accepting a resulting excessive attorney fee." Final Order, p. 10.[5]

If there was no breach of fiduciary duty, as we posit, there is no excessive fee violation. The fee of $2 million from a $7 million settlement was 28%, well within commercial litigation fee percentages. The fee was agreed to by the individual plaintiffs and TTUFF. In addition, Mr. Bloomberg explained that the fee agreement for the individual settlements would benefit the ultimate class because the fee would be credited to the court awarded fees for the class and the class case would proceed:

> A. Well, the earlier agreement said that once a class was certified, we would apply to the Court for attorneys' fees. So the contemplation was, get the class certified and you ultimately win your case and you ask for an award of attorneys' fees from the Court. So,

[5] We have addressed, in footnote 4, *supra*, why the 4-8.4 portion of the finding cannot stand because Bar Interrogatory Answer #40 asserted lack of candor as the basis for that allegation, and the Referee granted "Partial Final Summary Judgment in favor of Respondent Adorno on all disciplinary allegations that Adorno misled the court or tribunal." Final Order, p. 6.

> this was to reflect that the two million dollars that we would hopefully receive in the due process would be applied against whatever we would get from whatever the Court would award us at the end of the case.
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> * * *
>
> A. Well, I contemplated that we were going to wait until the City hopefully approved the settlement, which we thought was a home run for everybody, including the class, the putative class. And if they approved the settlement, we would go out and get our new plaintiffs and proceed with the balance of the refund case. If they did not approve the settlement, we had our named plaintiffs and were ready to proceed.

TR. Vol. 1, pp. 169-170.[6] Bloomberg, the partner in charge, was not able to immediately go out and get new plaintiffs after the December settlement because he was undergoing radiation and chemotherapy, and Adorno, whose role really was a three days in May event, was recovering from the death of his daughter. *Id.* at 172.[7]

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[6] Mitch Bloomberg is an important part of this case. He knows class action law and he saw nothing wrong with Judge Latimer's individual settlement request (TR. 149); he knew that Adorno relied on his advice (TR. 159) and that his advice was correct (TR. 185); that it did not violate any fiduciary duty (TR. 158); that it did not prejudice the class, but actually benefitted them (TR. 181-182); and that he was aware of his duties under the Code of Professional Responsibility and believes that Adorno & Yoss "fulfilled whatever responsibility, obligation, duty" he, Adorno and the Firm had to the putative class. TR. 183. This is not a case involving insensitive, unethical lawyers. Bloomberg and Adorno sought to do right; Adorno did no wrong.

[7] We take this opportunity to address a few loose ends caused by the Bar's small quarrels. The Bar says Adorno sought out Arriola "in the days between the mediation and the Refund trial." Bar Brief, p. 5. But there were no "days," there were only 36 hours between the May 24 evening mediation and the May 26

hearing, and Arriola wanted to meet. The Bar cites no record reference for the statement that Adorno spent "*significant time*" (emphasis supplied) on damages, and Adorno's presence at the February 17, 2004 hearing (Bar Brief, p. 7) was inconsequential. Bloomberg explained: "He had something downtown that morning and I know he had never seen Robin [Campbell] in court before, so he came to the hearing." TR115. Bloomberg testified that Adorno did nothing in the case other than "assist me with the damage model" (*id.* at 136); the Bar's exaggeration of Adorno's role is without merit.

There was no breach of duty. There was no excessive fee.

CONCLUSION

Henry Adorno violated no rule of professional discipline. Three recognized experts in the areas of class action litigation and ethics found that to be so and the Bar's expert acknowledged that the rules of discipline do not foreclose individual settlements before a claim is certified. A respected former judge, the late Henry Latimer, initiated the idea of individual settlements knowing that a class was imminent. Respected lead counsel told Adorno such settlements were permissible. Adorno relied on those advices. The putative class was not an Adorno & Yoss client. An "implied breach of fiduciary duty" to a non-existent client cannot be a violation of Rule 4-1.7 (or any other rule). *Compare Kaplan v. DiVosta Homes, L.P.*, 20 So. 3d 459,462 (Fla. 2d DCA 2009). While there was no breach of any duty here, there can be no violation of Rule 4-1.7 even if there were a fiduciary duty, because the putative class was not anyone's client. Nothing in Rule 4-8.4 prohibited the individual settlements. There was no excessive fee. The City's misguided plan to destroy the class should not result in a Bar sanction for Henry Adorno.

Respectfully submitted,
BRUCE S. ROGOW
Florida Bar No. 067999
CYNTHIA E. GUNTHER
Florida Bar No. 0554812
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
Ph: (954) 767-8909
Fax: (954) 764-1530
guntherc@rogowlaw.com

and

ANDREW S. BERMAN
Florida Bar No. 370932
YOUNG, BERMAN, ET AL.
17071 West Dixie Highway
North Miami Beach, FL 33160
Ph: (305) 945-1851
Fax: (305) 940-4616

By:_____
BRUCE ROGOW

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via E-mail and Federal Express this 14th day of July, 2010 to the following:

KENNETH L. MARVIN
THE FLORIDA BAR
Staff Counsel
651 East Jefferson Street
Tallahassee, FL 32399

KASEY PRATO
THE FLORIDA BAR
444 Brickell Avenue, Suite M-100
Miami, FL 33131

JOHN F. HARKNESS, JR.
Executive Director
THE FLORIDA BAR
651 East Jefferson Street
Tallahassee, FL 32399

_____
BRUCE S. ROGOW

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.

_____
BRUCE S. ROGOW