Electronically Filed 03/01/2013 03:22:48 PM ET

FILED, 3/1/2013, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

PATRICIA YOUNG, et al.,
Petitioners,

v.

Case No. SC12-988
L.T. No. 3D11-2129 & 3D11-2141

NORVA L. ACHENBAUCH, et al.,
Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

INITIAL BRIEF OF PETITIONERS

Christian D. Searcy
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409

Counsel for FAMRI

David J. Sales
1001 North U.S. Highway 1, Suite 200
Jupiter, Florida 33477

Counsel for FAMRI

John W. Kozyak
Thomas A. Tucker Ronzetti
Rachel Sullivan
Jessica E. Elliott
Kozyak Tropin & Throckmorton, P.A.
2525 Ponce De Leon, 9th Floor
Coral Gables, Florida 33134

Counsel for FAMRI

John S. Mills
Andrew Manko
Courtney Brewer
The Mills Firm, P.A.
203 North Gadsden Street, Suite 1A
Tallahassee, Florida 32301

Counsel for Flight Attendant Medical Research Institute ("FAMRI")

Miles A. McGrane III
The McGrane Law Firm
Datran One, Suite 1500
9100 South Dadeland Boulevard
Miami, Florida 33156

Counsel for Patricia Young

Roderick N. Petrey
508 Castania Avenue
Coral Gables, Florida 33146

Counsel for Alani Blissard

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES OF COURT

SECONDARY SOURCES

PRELIMINARY STATEMENT

Several of the key documents cited herein are included in the accompanying appendix for ease of reference. This brief cites only to the record, but the record volume and page numbers appear in the appendix and below:

1. Order Granting Former Class Representatives/Plaintiffs', Miles A. McGrane's and FAMRI's Motions to Disqualify (R10:1805-22)

2. *Broin v. Phillip Morris Cos., Inc.*, Nos. 3D11-2129 & 3D11-2141 (Fla. 3d DCA slip op. Mar. 21, 2012) (R26:4957-68)

3. Settlement Agreement (R1:97-114)

4. Client letter from Steven Hunter (R3:522-25)

5. Client letter from Philip Gerson (R3:540-43)

6. Patricia Young's Affidavit in Support of Motion to Disqualify (R3:498-503)

7. Alani Blissard's Affidavit in Support of Motion to Disqualify and Exhibits (R3:475-86)

8. Olivia Rossi Chambers' Affidavit in Support of Motion to Disqualify and Exhibits A, B, & D (R3:505-27)

9. Raiti Waerness's Affidavit in Support of Motion to Disqualify and Exhibits A, B, C, & E (R3:530-50)

10. Affidavit of Miles A. McGrane, III, In Support of Motion to Disqualify Counsel (exhibits not included) (R3:424-29)

11. Marvin Weinstein's Notice of Filing and in the Alternative Verified Motion to Intervene (R4:672-78)

12. Settling Defendant, Philip Morris USA Inc.'s Statement with Respect to Petition for Modification (R6:1119-23)

STATEMENT OF THE CASE AND OF THE FACTS

Having found the Florida Rules of Professional Conduct and this Court's precedents "inadequate … for determining when to disqualify an attorney for conflict of interest in the context of a class action," the Third District adopted a different test from the federal courts and quashed the trial court's order disqualifying attorneys Philip Gerson and Steven Hunter from seeking relief adverse to their clients. *Broin v. Phillip Morris Cos., Inc.*, 84 So. 3d 1107, 1112 (Fla. 3d DCA 2012). The trial court had disqualified the attorneys after finding impermissible conflicts with both current and former clients in violation of Florida Rules of Professional Conduct 4-1.7 and 4-1.9. Patricia Young, Alani Blissard, and the Flight Attendant Medical Research Institute ("FAMRI") ask this Court to quash the Third District's decision because the adequacy of this Court's rules in the context of a class action is an issue that is neither within the Third District's authority nor implicated by the facts of this case, and the trial court's ruling complied with the essential requirements of Rules 4-1.7 and 4-1.9.

Procedural History

This proceeding arises from a lawsuit brought by a class of flight attendants against the tobacco industry that was filed in 1991, settled in 1997, dismissed with prejudice in 1998, and had its closed file destroyed in 2004. (R1:97-114; R12:2275-78; R17:3186, 3274.) The lawsuit is known as the "Broin class action"

after Norma Broin, the original lead class representative. But contrary to the style of the opinion below, neither Broin nor the former class were petitioners in the Third District, and Philip Morris and the tobacco companies are, at most, only technical respondents. Fla. R. App. P. 9.020(g)(4).

In this Court, the petitioners, who were respondents-in-interest in the Third District, are Young, Blissard, and FAMRI. Young and Blissard were named representatives of the Broin class and now serve on the board of trustees of FAMRI, a non-profit 501(c)(3) scientific research foundation created with court approval pursuant to the Broin settlement agreement. (R3:475, 500, 505; R12:2293.) Young and Blissard contend that Gerson and Hunter represented them in their individual progeny actions brought against the tobacco companies pursuant to the settlement agreement. (R3:476-77, 500-03.)

Together with FAMRI, they moved to disqualify Gerson and Hunter after these attorneys filed a petition under the original Broin case number and caption that accused FAMRI's board of mismanagement and sought to modify the 1997 settlement and liquidate the foundation. (R1:72-93; R3:510-21.) Gerson and Hunter did not disclose the "petitioners" they purported to represent until after the disqualification order at issue, although they did file two post-petition notices that listed 53 names as "a sampling number of the Petitioners." (R1:64-69.)

The primary respondents in this Court are 261 individuals that Gerson and Hunter now claim were "petitioners" in the trial court, although the vast majority of their names (excepting only 16 who were included in the 53 names of the "sampling") were not revealed until Gerson and Hunter filed notices in the trial court after the disqualification order was entered.[1] They consist of (1) Norva Achenbauch and 259 other flight attendants listed by Gerson in his caption, the vast majority of whom Gerson first revealed and claimed to represent following his disqualification and (2) Judith Adams who Hunter now claims he was representing below. (R1:1-7; R10:1782.)

Finding conflicts of interest involving Young, Blissard, and hundreds of other flight attendant clients who objected to or otherwise did not consent to the filing of the petition, the trial court disqualified Gerson and Hunter. (R10:1805-22.) The trial court stayed further proceedings on the petition pending appellate review. (R25:4751-52.) Even though the disqualification order itself was never stayed, Gerson (3D11-2129) and Hunter (3D11-2141) defied it and the trial court by filing petitions for writs of certiorari in the Third District on behalf of the clients they were disqualified from representing. (R1:1-50; R10:1782-1800.)

[1] The appellate record does not contain these notices, but it does include letters from several of these individuals in which they deny Gerson's authority to represent them in the petition against FAMRI. (R20:3914-39, 3950.)

After the Third District consolidated and granted the petitions and denied rehearing or certification (R11:2115; R26:4957-69), Young, Blissard, and FAMRI invoked this Court's conflict jurisdiction. (R25:4705-08.) This Court stayed the proceedings below on October 18, 2012, and later accepted jurisdiction.

The Broin Litigation and Settlement

Although Gerson and Hunter had nothing to do with the class action litigation and eventually made clear that they do not purport to represent any class (R1:36; R5:891; R18:3463), the Broin class action and settlement that led to Gerson and Hunter's involvement in hundreds of individual progeny lawsuits form the predicate for the conflict issues in this case. Represented by Stanley and Susan Rosenblatt, Broin, Young, Blissard, and other representatives sued the major cigarette manufacturers in 1991 on behalf of a class of non-smoking flight attendants suffering diseases caused by exposure to second-hand smoke in airplane cabins. *See Broin v. Philip Morris Cos., Inc.*, 641 So. 2d 888, 889, 892 (Fla. 3d DCA 1994) (reversing dismissal of action and holding that class of 60,000 could be certified), *rev. denied*, 654 So. 2d 919 (Fla. 1995). The class was certified with the Rosenblatts serving as class counsel.

After the class put on 52 witnesses and rested three months into the 1997 trial and in the middle of the defense case, the parties reached a settlement agreement subject to court approval. (R1:97-114; R12:2228.) A court-approved

notice setting forth detailed information about the litigation and proposed settlement, including the formation of a not-for-profit foundation, and a full explanation of the rights of class members to object, was sent to over 190,000 former and current flight attendants, published in major publications across the globe, and posted on the internet. (R12:2258-59.) The court also appointed a guardian ad litem (Arno Kutner) and attorney ad litem (John Ostrow) who filed reports recommending approval of the agreement. (R1:143, 153, 173.)

This agreement provided that it could not be altered without all parties' consent and would be cancelled and the status quo restored if it was ever modified by the courts. (R1:110-12.) It provided for dismissal of the class litigation with prejudice and barred the flight attendants from seeking punitive damages in exchange for authorizing them to seek compensatory damages through new individual lawsuits in which they would enjoy a host of litigation benefits. (R1:102, 105-07, 124-27, 148-53, 174-75, 178.) Among other things, the defendants agreed to waive all statute of limitations defenses, to shift the burdens of proof on claims that second-hand exposure to tobacco smoke causes lung cancer, COPD, and other specified diseases, and to allow each flight attendant to file suit in his or her home venue. (R1:105-07, 124-27, 148-53, 174-75, 178.)

In addition to these individual benefits, the class obtained two common but less tangible benefits. First, the defendants agreed to pay $300 million to be used

"solely to establish a Foundation whose purpose will be to sponsor scientific research with respect to the early detection and cure of diseases associated with cigarette smoking." (R1:103.) Second, the defendants agreed to support federal legislation to ban smoking on all commercial flights beginning or ending in the United States. (R1:105.)

Despite the settlement's benefits, a "handful" of class members comprising "only a fraction of one percent" of the class objected because the settlement did not result in any monetary compensation to class members. *Ramos v. Philip Morris Cos., Inc.*, 743 So. 2d 24, 28 (Fla. 3d DCA 1999). In affirming the trial court's approval of the settlement, the Third District concluded that the individual litigation benefits were "**abundant**, as recognized by virtually all of the class members, as well as the law professors, and class action and tobacco litigation experts." *Id.* at 31. It noted that there were "substantial risks and weaknesses in the flight attendants' case" and that the class would have faced significant hurdles relating to causation and the applicable statutes of limitation, the latter posing "a **serious** problem for **most, and close to all** of the class members." *Id.* at 28, 31-32 (internal quotations omitted). The Third District emphasized that the litigation benefits were "**substantial** in light of the trial court's pronouncement that the class had a **less than 50/50 chance of success**" absent the settlement. *Id.* at 32. The trial court had similarly emphasized the class "had a genuine and real reason to fear

directed verdict" on the released intentional tort claims, which both the trial and appellate courts called the "weakest link" in the cases. *Id*. at 28, 32.

Although the Rosenblatts had fought for compensation to class members in settlement negotiations, the defendants refused and considered it an "absolute deal killer" for any money to go to flight attendants as opposed to funding a research foundation. (R13:2389-92.) The trial court found that the research would provide some benefits to class members, but indicated that "even if the settlement fund were not part of the settlement … the benefits of the other non-monetary provisions of the proposed settlement, warrant approval of the settlement" and that there was authority for class settlement agreements to establish "a charitable foundation," even one that "will not directly benefit class members." (R1:143 (citing *Edwards v. Alaska Pulp Corp.*, 920 P.2d 751, 753 (Alaska 1996)).) On appeal, the Third District approved the creation of the "foundation fund" and concluded that payment to class members was just not a viable option:

> There is nothing to indicate that the tobacco companies would agree to settle if the money is to be directly paid to the class members. As defense counsel argued, **none** of the defendant tobacco companies have ever **voluntarily** or through **successful litigation** paid any compensation to any individual plaintiff in **any** lawsuit to date.

Ramos, 743 So. 2d at 32.

The settlement having been approved, the trial court reserved jurisdiction to oversee the creation and funding of the nonprofit research foundation. (R12:2275-

78, 2289-92.) In 2000, the court noted FAMRI's incorporation, released its restrictions on the foundation funds, and gave FAMRI's board the authority to operate independently and expend the foundation funds in accordance with the court approved articles of incorporation and bylaws. (R12:2293.) FAMRI is regulated by state and federal laws governing non-profit foundations. Its independent board of seven trustees includes four flight attendants, (Blissard, Young and two former class members), the Rosenblatts, and John Ostrow, whom the trial court had appointed first as attorney ad litem for absent class members during the proceedings to approve the settlement and then as special master to oversee the formation of the foundation. (R2:201; R12:2182.) As a nationally recognized research foundation, FAMRI has sponsored a large body of scientific research on the early detection, treatment, and cure of diseases associated with cigarettes (including the diseases contracted by flight attendants from cabin smoke exposure) with thousands of publications in peer-reviewed journals. (R12:2182.)[2]

Individual Progeny Flight Attendant Actions

About 3,000 out of an estimated 60,000 class members filed progeny lawsuits. *Philip Morris Inc. v. French*, 897 So. 2d 480, 481, 483-84 (Fla. 3d DCA

[2] The 2010 FAMRI monograph in the record describes the foundation's "Decade of Progress" funding science at top institutions to prevent, treat, and cure these diseases. (R1:182-3:422.) FAMRI "provide[s] flight attendants with medical screening centers throughout the United States for the early detection of diseases." (R12:2182); *see also* www.famri.org (last visited Feb. 28, 2013).

2004). In early 2000, a team of attorneys, including Gerson, Hunter, Miles A. McGrane, and Marvin Weinstein agreed to represent flight attendants and filed the progeny lawsuits. (R3:424-26, 500; R4:672-73.) Hunter filed over 400 lawsuits and Gerson over 600, and also worked as a team to represent flight attendants who directly retained McGrane, Weinstein, and other attorneys. (R3:425-26, 500; R4:672-73; R6:1133-R9:1727, 1729-30, 1744; R17:3166-72.) The team members met regularly to work together on their cases, shared confidential information, and covered hearings for each other. (R3:425-26, 428; R4:672-73; R9:1729-30, 1744.)

Young and Blissard were among the flight attendants represented by the legal team. Blissard directly retained Hunter, but also worked with Gerson and others, all of whom she "trusted [as] members of [her] legal team." (R3:476-77.) Young directly retained McGrane, but met regularly with Gerson and Hunter regarding her case, particularly while McGrane served as president of The Florida Bar. (R3:500-01.) She averred that Gerson and Hunter were "jointly handling my case" with McGrane and others. (R3:500.) Indeed, McGrane, Blissard, and Young stated that in the course of this approach, Gerson and Hunter gained confidential information about FAMRI. (R3:428, 476-77, 500-01.) Blissard provided information about FAMRI's internal operations. (R3:476-77.) Young noted that the attorneys sought her assistance to help their experts get FAMRI funding and asked to have their experts bypass FAMRI's peer-review requirements. (R3:500-02.)

Despite the benefits of the settlement and the large legal team assembled, the progeny actions largely languished for over a decade. (R6:1133-R9:1727, 1744.) For example, Raiti Waerness, whose action was filed by Gerson, and Olivia Rossi Chambers, whose action was filed by Hunter, did not hear anything for ten years, until receiving form letters from Gerson and Hunter soliciting their consent to their already-filed petition to modify the settlement. (R3:505-09, 522-27, 530-43.) Dockets from the hundreds of lawsuits Gerson and Hunter filed reveal that over 130 were dismissed for lack of prosecution, with clients' court files destroyed; the overwhelming majority have had no record activity for over a decade, with less than a dozen cases tried to verdict. (R6:1133-R9:1727; R18:3450-61.)

During a period of at least ten years of assisting Hunter in both her own case and those of other flight attendants, Blissard expressed to him her frustration that so few cases had gone to trial. (R3:476-77; R9:1744.) In response, he assured her of the benefits of the attorneys' team approach, stating "as long as we are working on any one of these cases, it benefits all of you." (R9:1744.) He also asked her to request funds from FAMRI to cover the individual litigation expenses he was supposed to advance. (R3:476-77.) She brought this request to the FAMRI board, which consulted with counsel and determined that it could not legally comply with the request. (R3:476-77.) Gerson and Hunter also asked Young to try to obtain money from FAMRI, but received the same answer. (R3:501.)

Gerson and Hunter's Attempts to Liquidate FAMRI

Having made little progress in the progeny actions and undeterred by Blissard and Young's explanations regarding FAMRI's legal constraints, Gerson and Hunter changed their focus from trying to recover from tobacco companies to seeking to liquidate FAMRI as an exit strategy from the flight attendants' cases. In February 2010, they submitted a draft petition to FAMRI's board and requested FAMRI's cooperation to distribute a portion of its research funds to the flight attendants who filed individual lawsuits that were still pending and in need of closure. (R3:554-60.) They later proposed an "Injured Flight Attendants' Trust" whereby a portion of FAMRI's assets would voluntarily be placed in trust by FAMRI as compensation for individual flight attendants (with Gerson, Hunter, and their co-counsel taking 30%), and finally a tax reorganization that would dissolve FAMRI and divide its assets between two new 501(c)(3) foundations, the second in the names of Gerson, Hunter, and their clients to be promptly dissolved and the funds distributed. (R3:562-63; R4:645.) FAMRI's board rejected each proposal because of serious legal constraints. (R3:476-78, 501-02.)

When Blissard learned that Gerson and Hunter were contemplating filing a formal petition against FAMRI, she wrote Hunter a letter on April 28, 2010, to register her opposition to any such suit. (R3:483.) She explained:

> As Trustees, [Young] and I have been accused of not following our mission and not helping or benefitting flight attendants through

> funded research. This is simply not true. However, even if it were, you, who represents [sic] me, and the other counsel cannot sue FAMRI when your client – me – is harmed by your actions. All other flight attendants are also harmed if FAMRI is harmed, and I strongly oppose what you are doing. ….
>
> We want compensation from tobacco companies that caused our diseases and medical conditions, not from FAMRI. I certainly do not want you or any of your group of Gerson [and others] to bring any claims against FAMRI or sue FAMRI for any reason.

(R3:483.) Hunter's response was to move to withdraw from her case after ten years as her counsel. (R3:487-89.) He filed his motion to withdraw in June 2010, and it was granted later that month over Blissard's opposition after she travelled to the hearing in Miami from her home in Hawaii. (R3:477, 490-91.) Like Blissard, Young also felt betrayed after learning that Gerson and Hunter were preparing to sue FAMRI. (R3:502.) Having long been active in the flight attendants' efforts against the tobacco industry, she was confident that none of the flight attendants had asked these lawyers to go after FAMRI. (R3:502-03.)

Young and Blissard were not the only clients to oppose the attacks on FAMRI as antithetical to their interests. For example, when Waerness learned in April 2010 that Gerson was contemplating suing FAMRI, she complained that he had never contacted her about this, she had never authorized him to pursue this matter, and she was strongly opposed to it. (R3:530-32, 536.) He wrote back on May 4, 2010, assuring her that he would not take any action on her behalf of which she disapproved. (R3:531, 538.) Instead, a little over three weeks later, he filed a

motion to withdraw as her counsel, although he did not set it for hearing until long after formally filing the petition to dissolve FAMRI. (R3:534; R4:771-79.)

Another of his clients, Peggy Spurgeon, wrote Gerson in April 2010 to oppose any actions against FAMRI whose "good work is very important to me and other flight attendants" and to emphasize that suing FAMRI "adversely impacts me, your client, and other flight attendant clients." (R3:567.) Gerson never responded to her, but later filed an affidavit in which he stated that he never represented her because he "only" filed her progeny lawsuit, she never signed a fee agreement, and her case was dismissed for lack of prosecution in 2008. (R4:769.)

Co-counsel McGrane advised Gerson and Hunter in May 2010 that he could not participate in any legal action against FAMRI because Young and many of his other flight attendant clients opposed his doing so. (R4:634-35.) Accordingly, he advised Gerson and Hunter that to proceed against FAMRI against the wishes of these flight attendant clients would create a conflict of interest. (R4:634-35.)

Unmoved by their clients' and co-counsel's mounting opposition to liquidating FAMRI, Gerson and Hunter launched their formal legal attack on FAMRI and its board by filing the subject petition on December 1, 2010 in the long-closed Broin case. (R3:510-21.) The petition said that it was "brought on behalf of flight attendant class members of the above styled action" without naming any of them. (R3:510.) It was signed by Gerson, Hunter, and a third

attorney, all of whom simply put "Attorneys for the Petitioners" in the signature block.[3] (R3:520.) The petition sought to recover FAMRI's remaining funds and to recoup "all misused funds" to be distributed to "class members." (R3:511, 519.) At the hearing on the motion to disqualify, Gerson and Hunter clarified that they were not representing any class and were pursuing the petition solely on behalf of a subset of their individual flight attendant clients that signed their post-petition solicitation letters. (R5:888-89, 891.)

Gerson and Hunter's petition alleges that "FAMRI through its Board of Directors has substantially deviated from the Court approved purposes and has misused the settlement funds." (R3:511.) The petition sought modification of the settlement agreement claiming that the individual lawsuits authorized by the settlement turned out to be "unproductive, expensive and time consuming" and that flight attendants had lost ten out of eleven trials in the past thirteen years due to an insufficient body of scientific evidence of disease causation, and charged FAMRI with not producing sufficient research studies to establish the lacking scientific evidence. (R3:517-18.) Finally, in a section captioned "Equitable Justifications for

[3] This third attorney, whom McGrane brought on in 2005 as co-counsel for his progeny cases, was also disqualified, but he did not challenge his disqualification in the Third District and his name was removed from all service lists. (R1:47; R10:1798.) Four new attorneys were later brought in as co-counsel with Gerson and Hunter, but they, too, declined to challenge their disqualification and asked to be removed from all service lists. (R1:47; R10:1798; R20:3911-12.)

Granting Modification," the petition asks for FAMRI's dissolution and distribution of all remaining funds as "monetary compensation to the class members now, in the twilight of their lives." (R3:518-19.)

FAMRI moved to dismiss the petition, and Philip Morris filed a statement in opposition to the petition to modify the settlement, emphasizing that a "material term of the settlement" was that no settlement funds be paid to members of the class and that the foundation's sole purpose is to sponsor "scientific research with respect to the early detection and cure of diseases associated with cigarette smoking." (R6:1119-23; R19:3588-98.) Because the trial court disqualified Gerson and Hunter and then stayed its proceedings before reaching the motion to dismiss, that motion will remain pending until this proceeding is resolved. (R25:4751-52.)

Lack of Prior Authorization From or Informed Consent By Clients

The record contains no evidence that Gerson and Hunter had obtained consent from any of their clients before they started their efforts to liquidate FAMRI in early 2010 or even before they filed the petition to modify the settlement on December 1, 2010. To the contrary, the record contains form "status" letters in which they sought their clients' consent only afterwards. (R3:573-81.)

For example, even though he had moved to withdraw from her individual case after she let him kn0w that she opposed any efforts against FAMRI, Gerson sent Waerness a letter dated January 4, 2011. (R3:536, 538, 540-43; R4:666-70.)

This was a "Dear Client" form letter sent in the guise of an update on the status of the individual lawsuits. (R3:540.) Gerson opened by advising that he had been working with the "other lawyers representing flight attendants in individual lawsuits" and that they "have reached a consensus for the best way [sic] bring this litigation to a successful conclusion and finally provide you with monetary compensation we believe you deserve." (R3:540.) He then criticized the settlement agreement the Rosenblatts had negotiated for the class back in 1997, particularly as to the individual progeny lawsuits. (R3:540.) He emphasized that his "firm had nothing to do with agreeing to the settlement of the original class action" and advised, "It is clear now 12 years since this agreement was reached; the settlement **HAS NOT** met its goal of benefitting the class members." (R3:541.)

Gerson accused FAMRI's board members of having misused its funds and also claimed that FAMRI's purpose was rendered "largely unnecessary and indeed almost impossible to achieve" after a 2000 federal ban on smoking on commercial flights. (R3:542.) Even though the same settlement agreement requiring the funding of FAMRI had also required the tobacco companies to support that ban, Gerson not only failed to mention this benefit, but emphasized that the ban "was not the product of FAMRI's efforts." (R3:542.) And here is what he told his clients about the petition he and Hunter had already filed:

> After careful consideration and analysis of the legal and practical issues the judgment of a group of attorneys who are

> representing the individual flight attendants is to advise our clients to act. We propose filing a petition on behalf of you and all other class members [excepting any who do not want to participate] against FAMRI and its board members. In the petition we would, on your behalf, ask the judge to modify the original settlement agreement and to pay all available remaining funds to the individual flight attendants on an equal basis. Recovery of funds not expended properly may occur too. If successful you would receive a cash distribution of a least a portion of the remaining funds.

(R3:542.) He did not explain that the petition had already been filed. The letter closed by asking any flight attendants who wished for him to proceed in this fashion to agree that he would be entitled to a fee of 30% of any recovery and to sign and return his letter. (R3:542-43.)

Within a week of receiving the motion to disqualify, which included a copy of Waerness' affidavit with the foregoing form letter, Gerson set a hearing on his motion to withdraw as counsel for Waerness in her progeny action. (R1:72; R6:1019.) At the June 2011 hearing on his motion to withdraw, Gerson falsely represented to the trial court that Waerness had fired him over a year ago. (R5:825.) Waerness, a Washington resident, was not able to attend, but Ostrow provided the trial court a copy of her affidavit indicating that she did not consent to the withdrawal. (R5:824-26.) Gerson responded, "I want out of this case against the tobacco companies," and the trial court granted his motion because the judge had a policy of not "mak[ing] anybody stay on a case they don't want to stay on." (R5:827-29.) Thus, while Waerness was a current client of Gerson beyond the time

he (a) learned that she objected to any action against FAMRI, (b) promised not to take action on her behalf of which she disapproved, and (c) filed the petition anyway (R3:536, 538; R6:1019, 1028), she had been reduced to "former client" status by the time of the hearing on the motion to disqualify.

The record discloses similar circumstances for Hunter. In the eleven years since Chambers hired him in 2000 to pursue her progeny action, the first and only time she heard from him was a letter dated January 31, 2011, two months **after** he had filed the petition. (R3:505-08, 522-25.) He stated that the only thing standing in the way of compensation to his clients from FAMRI to bring closure to their progeny lawsuits was that "class counsel Stanley and Susan Rosenblatt do not want to give any monies directly to individual flight attendants." (R3:522.) He attached a "fact sheet" that appears to be a "cut and paste" from Gerson's letter containing the same false and misleading representations detailed above. (R3:522-25.)

Chambers wrote Hunter to object to any attempt to compensate her from the funds that were supposed to fund FAMRI's research, and she called the petition "outrageous." (R3:526-27.) She explained why that research has been a "HUGE benefit to me and other flight attendants," criticized his letter as misleading, and advised that she and other flight attendants knew the reason they did not receive money from the settlement was not due to the Rosenblatts, as Hunter had claimed, but because the tobacco companies refused. (R3:526-27.) She compared his actions

to "suing your own clients since you will be hurting me and other flight attendants who love the good work of our Foundation. There is ongoing research sponsored by FAMRI to help me and other flight attendants detect our diseases earlier and help us find cures." (R3:527.) She advised that "speaking for myself and others in our class, we are very happy with our research foundation FAMRI. But we are VERY UNHAPPY with you, the lawyers who forgot about our lawsuits for over 10 years and now want to take our research funds away." (R3:527.) She insisted that Hunter promptly dismiss the petition. (R3:527.)

Instead of responding, Hunter merely set a hearing on a motion to withdraw, which was granted on May 10, 2011. (R3:507-08, 528.) Thus, while Chambers was a current client of Hunter beyond the time he filed the petition and after her objections, by the time of the hearing on the motion to disqualify, she was a "former client."

Disqualification Proceedings in Trial Court

FAMRI, Young, and Blissard raised the issue of disqualification at the first hearing in front of Judge Bagley, a status conference, and then served their motion to disqualify Gerson and Hunter ten days thereafter, on May 23, 2011. (R17:3176, 3207-08; R19:3599-3620.) They sought disqualification based primarily on Florida Rules of Professional Conduct 4-1.7 and 4-1.9 governing conflicts of interest with

current and former clients. (R19:3612.) They supported the motion with the affidavits and documentary exhibits cited for the foregoing facts. (R1:94-R3:589.)

McGrane filed an affidavit that independently demanded disqualification of these attorneys and detailed how he had worked closely with them on the individual flight attendant cases over the past eleven years.[4] (R3:424-29.) He confirmed that Young and Blissard had shared confidences regarding FAMRI with the team of lawyers, including Gerson and Hunter. (R3:425.) He recognized that "a grave injustice is being done here by attorneys with conflicts to the detriment of my clients and our shared clients" and followed his "moral and ethical duty to intervene where attorneys with serious conflicts are proceeding against the interests of my clients and our joint clients." (R3:425.)

Marvin Weinstein filed a verified motion to intervene on behalf of several hundred individual flight attendants for whom he was lead counsel. (R4:672-78.) He was concerned that the petition created conflicts of interest because Gerson, Hunter, and the other attorneys on the litigation team had all shared confidences with their joint clients over many years. (R4:673.) He sought leave for his clients to intervene to oppose the petition because they benefit from FAMRI, which the petition seeks to destroy. (R4:674-76.) He averred that Gerson and Hunter had long

[4] The trial court accordingly treated him as an additional movant both individually and on behalf of his flight attendant clients. (R10:1805.)

recognized that FAMRI had, in fact, been successfully funding the appropriate medical research benefitting non-smoking flight attendants. (R4:674-76.)

In a memorandum filed through separate counsel, Gerson and Hunter argued that Rule 4-1.7 regarding conflicts with current clients did not apply because they withdrew their representation from any client who expressed an objection to the petition. (R4:687-91.) They argued that Rule 4-1.9 regarding conflicts with these now former clients did not apply because their previous representation of those clients was unrelated to the subject matter of the petition. (R4:691-95.) They also submitted affidavits in which they claimed that they had received no confidential information regarding FAMRI. (R4:765-70, 780-81.) They both denied ever representing Young. (R4:689.)

At the June 30, 2011 hearing on the motion to disqualify, the trial court offered the parties as much time as they wanted to provide all the evidence they wished. (R5:859-60.) Gerson and Hunter indicated that they had no objection to the court admitting in evidence the affidavits and exhibits submitted in support of and in opposition to the motion to disqualify, and the court accepted them into evidence. (R5:839-40.) Gerson and Hunter offered no testimony and presented no additional evidence at the hearing. After Young, Blissard, and FAMRI filed a post-hearing memorandum (R9:1753-65), counsel for Gerson and Hunter wrote a letter to the trial judge emphasizing that they considered the matter ripe for a

determination without further litigation or submissions, providing a transcript of the hearing and advising that, unless directed otherwise, they were resting entirely on the arguments at the hearing and their prior written submissions (R20:3910).

In its order granting the motion to disqualify, the trial court noted that the parties had chosen not to present live testimony, so it decided the facts based on the affidavits and documentary evidence admitted by agreement. (R10:1805, 1808.) After summarizing this evidence, the trial court concluded that Gerson and Hunter had filed the petition without the consent of the majority of flight attendants for whom they filed progeny lawsuits, in conflict with Rules 4-1.7 and 4-1.9. (R10:1815.) The court concluded that the affidavits and other evidence established the two prongs for disqualification based on conflicts with former clients established by this Court: (1) that an attorney-client relationship existed and (2) that the attorney was acting against the movant's interest in a matter that is substantially related to the matter in which the attorney had previously represented the movant. (R10:1817-18 (citing *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991).) It also concluded that Gerson and Hunter had improperly converted Blissard and Young to "former client" status by dropping them "like a hot potato" when it became clear that they opposed the attack on FAMRI. (R10:1818-19.) In any event, even if they were former clients, the court found that Gerson and Hunter's representation of Young and Blissard in their

progeny actions was substantially related to the attack on FAMRI because they both arose directly from the settlement agreement. (R10:1817.)

The trial court also concluded that Gerson and Hunter violated the prohibition against representing interests adverse to current clients because they filed the petition to modify the settlement without the consent and authorization of hundreds of their own clients. (R10:1815.) Moreover, they purported to be representing all class members when they filed the petition even though many of their own clients and hundreds of other class members opposed their actions and there was no evidence they obtained authorization to file the petition on behalf of any of them. (R10:1818-19.) The trial court concluded that "there is clearly an appearance of impropriety, in the form of an undermining of the loyalty and trust upon which an attorney-client relationship is based." (R10:1821.)

Certiorari Proceedings at the Third District

Following their disqualification, Gerson and Hunter filed certiorari petitions with the Third District to reinstate themselves as counsel. Gerson's petition stated that it was filed on behalf of 260 clients that he had just been disqualified from representing. (R1:1-7.) Hunter's petition stated that it was filed on behalf of only Judith Adams. (R10:1782.) The Third District ultimately quashed the disqualification order and reinstated Gerson and Hunter based on three holdings.

First, after summarizing the requirements of Rules 4-1.7 and 4-1.9, which do not require proof of actual prejudice, the district court rejected those rules in favor of a balancing test borrowed from a few federal and out-of-state decisions:

> The need to balance the traditional rules of loyalty to a client, duties to the court, and duties to the class as a whole, calls for adaptation of the traditional conflict model. …
>
> The mere appearance or possibility of conflict is not enough in this context … .
>
> This case demonstrates why Florida's Rules of Professional Conduct alone are inadequate to resolve conflict of interest problems typical to class action cases. …
>
> ….
>
> The federal courts' approach affords a better method for determining when to disqualify an attorney for conflict of interest in the context of a class action. This approach balances a party's right to select his or her own counsel against a client's right to the undivided loyalty of his or her counsel. Accordingly, we conclude that, before disqualifying a class member's attorney on the motion of another class member, the court should balance the actual prejudice to the objector with his or her opponent's interest in continued representation by experienced counsel.

Broin, 84 So. 3d at 1111-12.

Second, the court concluded that Rule 4-1.7, governing conflicts among current clients, did not apply in any event because Gerson and Hunter did not currently represent either Young or Blissard. *Id.* at 1112. It noted that Gerson and Hunter had previously "personally represented" one of these flight attendants but withdrew from that representation upon learning of her objection to the petition. *Id.*

Third, the opinion held that the trial court had departed from the essential requirements of the law by failing to apply the balancing test the Third District had just adopted for the first time. *Id.* Applying this new test de novo, the Third District granted the certiorari petitions because it concluded that Gerson and Hunter's other clients' "right to be represented by experienced counsel of their choice is outweighed [sic] by any prejudice to" Blissard and Young, actually praising Gerson and Hunter for "demonstrat[ing] their ability to effectively advocate for their clients, and seek[ing] to provide benefits to all class members." *Id.*

Blissard, Young, and FAMRI moved for rehearing, certification of questions of great public importance, and rehearing en banc. (R24:4616-R25:4652.) They emphasized that in *K.A.W.*, 575 So. 2d 630 (Fla. 1991), this Court expressly held that Rules 4-1.7 and 4-1.9 provide the governing standard for motions to disqualify counsel. (R24:4626; R25:4644-47.) They also pointed out that the federal and out-of-state cases on which the court relied all involved conflicts facing class counsel, while this is a long dismissed and closed class action case and Gerson and Hunter were never counsel to any class and only jointly represented individual flight attendants. (R24:4617-21; R25:4637-38.) And they noted that in *The Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011), this Court applied Rule 4-1.7 in the specific context of a conflict of interest in a class setting. (R24:4626, 4628-29; R25:4640, 4644-45.)

Gerson and Hunter filed responses confirming that they "never suggested that they are class counsel." (R25:4667, 4697-98.) They maintained that the Third District had not actually used the balancing test it created, calling its holding "dicta" and an "academic discussion," and had instead "unquestionably" rested its reversal of the disqualification order on the lack of violation of Rules 4-1.7 and 4-1.9. (R25:4671, 4692-95.) The Third District summarily denied these motions without comment. (R25:4721.)

SUMMARY OF ARGUMENT

Not only did the Third District lack the authority to decline to apply the Florida Rules of Professional Conduct in the class context as this Court's precedents require, but its decision also reflects a misunderstanding of the non-Florida case law from which it imported its new "balancing test." Those cases all involve conflicts facing class counsel. But Gerson and Hunter never represented any class; they represent individual flight attendants in their progeny actions. And in any event, the class action was dismissed with prejudice 15 years ago.

Instead of creating new law to supplant this Court's precedents that it found "inadequate," the Third District should have determined whether the trial court's application of Rule 4-1.7 and 4-1.9 to the facts of this case was a departure from the essential requirements of the law. Under that standard, Gerson and Hunter's certiorari petitions must be denied. The analysis need go no further than

considering Rule 4-1.7's prohibition against taking on new matters adverse to current clients and how that rule applies to Young and Blissard. They were both current clients of Gerson and Hunter in early 2010 when those attorneys started down the path of abandoning trials against the tobacco companies in favor of going after FAMRI's funds. From the beginning, this endeavor involved accusations of misconduct against their clients Young and Blissard in FAMRI's board decisions. This simple fact alone justified their disqualification. But there is more.

Gerson and Hunter's attack on FAMRI was against the interests of all of their other flight attendant clients, as evidenced by objections they received from Waerness, Chambers, and Spurgeon. Not only does it threaten to end the valuable research and free screening that benefits these clients, but it also threatens to undo the settlement altogether, including the litigation benefits the Third District found were so substantial in *Ramos* to warrant approving the agreement without any compensation to class members. As *Ramos* made clear, the tobacco companies never would have agreed to pay compensation to the flight attendants. And the agreement itself provides that it cannot be modified, as Philip Morris has already pointed out in opposition to the petition.

While they may have obtained authorization by a minority of their clients to proceed against FAMRI in the hope of gaining compensation, they did this only after the fact, and they are still proceeding against the interest of the many clients

who did not consent. And even with respect to those who signed their letters, that consent is not informed because the letters are rife with false information.

Gerson and Hunter attempted to avoid the clear prohibition of Rule 4-1.7 by trying to "convert" any current client who opposed them to former client status by abandoning their progeny actions. As an initial matter, the Florida Rules of Professional Conduct do not allow a lawyer to drop his client for the purpose of taking action against her interest. But even if this were allowed, Rule 4-1.9 still supports the disqualification order because the attempt to modify the settlement agreement to liquidate FAMRI is substantially related to the progeny actions that were authorized solely through that agreement. Moreover, they gained confidential information about FAMRI from their representation of Young and Blissard, so even if actual prejudice were required, it is present.

ARGUMENT

The trial court correctly disqualified Gerson and Hunter because they violated the ultimate duty of all lawyers when they acted to benefit themselves at their clients' expense. The Third District's contrary decision should be quashed because (I) the adequacy of this Court's rules to resolve conflicts of interest in the context of a class action is neither within the Third District's authority nor implicated by the facts of this case, (II) Florida Rule of Professional Conduct 4-1.7 requires disqualification because Gerson and Hunter pursued relief adverse to

current clients and could not circumvent that requirement by dumping those clients who complained, and (III) alternatively, Florida Rule of Professional Conduct 4-1.9 requires disqualification because Gerson and Hunter's attempt to modify the Broin class settlement agreement is substantially related to their representation of former clients in progeny actions brought pursuant to that settlement.

I. THE ADEQUACY OF THIS COURT'S RULES TO RESOLVE CONFLICTS OF INTEREST IN CLASS ACTIONS IS NEITHER WITHIN THE DISTRICT COURT'S AUTHORITY NOR IMPLICATED IN THIS CASE.

Standard of Review. The interpretation and application of this Court's Rules of Professional Conduct is a pure legal issue reviewed de novo. *E.g.*, *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006).

The Third District found the Florida Rules of Professional Conduct to be "inadequate to resolve conflict of interest problems typical to class action cases" and jettisoned this Court's rules and precedents in favor of a balancing test as the "better method for determining when to disqualify an attorney for conflict of interest in the context of a class action." *Broin v. Phillip Morris Cos.*, 84 So. 3d 1107, 1112 (Fla. 3d DCA 2012). Not only did the Third District lack the authority to decline to follow this Court's rules and precedents, but the balancing test it adopted from the federal and out-of-state cases is not applicable to the facts here.

That district courts must follow this Court's precedents even if they disagree with them should be beyond dispute. *Hoffman v. Jones*, 280 So. 2d 431, 433 (Fla.

1973); *see also State v. Dwyer,* 332 So. 2d 333, 335 (Fla. 1976) (noting that a district court cannot decline to follow a supreme court holding just because federal courts have issued contrary decisions). But the Third District refused to follow this Court's holdings that the Florida Rules of Professional Conduct provide the test for motions to disqualify counsel, *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991), and that Rules 4-1.7 and 4-1.9 apply to conflicts facing class counsel, *The Fla. Bar v. Adorno*, 60 So. 3d 1016, 1023 (Fla. 2011). This defiance is especially troubling because this Court has not only the constitutional duty, but the exclusive jurisdiction to create and modify the rules governing lawyer conduct. Art. V, § 15, Fla. Const.; R. Regulating Fla. Bar 1-12.1; *The Fla. Bar v. Daniel*, 626 So. 2d 178, 183 (Fla. 1993); *The Fla. Bar v. McCain*, 330 So. 2d 712, 714 (Fla. 1976). The Third District's decision therefore represents an unprecedented usurpation of this Court's authority.

The Third District relied on federal and out-of-state decisions that hold that professional conduct rules can lead to unfair results when applied to the unique situation of the conflict facing class counsel when some class members object to a proposed class settlement. *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 589 (3d Cir. 1999); *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 19 (2d Cir. 1986); *In re Holocaust Victim Assets Litig.*, 2007 WL 805768, at *42 (E.D.N.Y. Mar. 15, 2007); *Kullar v. Foot Locker Retail, Inc.*, 121 Cal. Rptr. 3d 353, 358 (Cal. Ct. App.

2011). The policies underlying these decisions involve the problem that arises when an attorney puts in years of work on behalf of a class only to have some members break off from the class and oppose a proposed settlement. The driving concerns in these instances were that the class would lose the counsel most experienced in the issues and, more importantly, minority class members would have undue leverage by allowing them to force the majority to seek new counsel. But these cases and their underlying policies have no relation to this case.

While Gerson and Hunter allege their individual clients were members of a class that was a party to the 1997 settlement agreement, they were never class counsel, and the class action had long been dismissed with prejudice. Gerson and Hunter did nothing for the class as a whole and their petition would actually disenfranchise all unrepresented former class members who benefit from FAMRI-funded scientific research pursuing better treatments and cures for their diseases and to detect disease at its earliest, most curable stage. (R1:182-R3:422.)

None of the cases on which the Third District relied even remotely suggest that the balancing test would apply to conflicts facing lawyers who chose to represent a large number of individual clients. Indeed, the main case on which the federal appellate court relied in *Lazy Oil* provides that even counsel representing a class is prohibited from abandoning the interests of the class as a whole to represent only the individual class members who oppose a class settlement. *In re*

Corn Derivatives Antitrust Litig., 748 F.2d 157, 161 (3d Cir. 1984). But the point is that because Gerson and Hunter are not and never were class counsel and the class action is long closed, this case does not present the question of whether Rules 4-1.7 and 4-1.9 would be "adequate" to resolve the conflict class counsel faces when class members object to a proposed settlement counsel has negotiated.

II. THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF THE LAW IN CONCLUDING THAT THE RULES OF PROFESSIONAL CONDUCT REQUIRED GERSON AND HUNTER'S DISQUALIFICATION.

Standard of Review. Because orders disqualifying counsel are subject only to certiorari review, the district court's review should have been limited to a consideration of whether the trial court departed from the essential requirements of the law in granting the disqualification motion. *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 721-22 (Fla. 2012). Such a departure occurs "only when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice." *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1092 (Fla. 2010). The trial court's findings of fact should not be rejected "unless they are clearly erroneous." *Carnival Corp. v. Romero*, 710 So. 2d 690, 694 (Fla. 5th DCA 1998).

The district court clearly disregarded the certiorari standard because a certiorari proceeding "cannot be used to **create** new law where the decision below recognizes the correct general law and applies the correct law to a new set of facts

to which it has not been previously applied." *Nader*, 87 So. 3d at 723. Nor can a district court sit as the fact finder in a certiorari proceeding and resolve issues on which the parties had no chance to develop a record or argument. *Robertson v. State*, 829 So. 2d 901, 908-09 (Fla. 2002). Indeed, by finding this Court's rules to be inadequate to address the conflicts in this case, the Third District necessarily found that the trial court had properly applied those rules to disqualify Gerson and Hunter. But because Gerson and Hunter are certain to contend in their answer brief that the trial court departed from the essential requirements of the law, the remainder of this brief demonstrates why the trial court's conclusion that Rules 4-1.7 and 4-1.9 each independently required their disqualification is correct.

A. Rule 4-1.7 Applies Because Gerson and Hunter Pursued Relief Adverse to Many Active Clients, and the Rule Cannot Be Evaded by Dropping Clients Who Object.

The trial court's conclusion that disqualification is required under Rule 4-1.7 because Gerson and Hunter proceeded against the interests of hundreds of current clients was fully consistent with the essential requirements of the law notwithstanding the fact that Gerson and Hunter sought to evade Rule 4-1.7 by dropping clients who had the audacity to voice their objections. Gerson and Hunter's actions in seeking to liquidate FAMRI based on claims of mismanagement by its board were not only antithetical to the interests of their two clients serving on that board, but also against the interests of the many hundreds of

flight attendants they represent who benefit from both the Broin settlement agreement generally and the good work of FAMRI in particular.

Subject to an exception only applicable where, at a minimum, each affected client has given written informed consent, Rule 4-1.7 provides:

> [A] lawyer shall not represent a client if: (1) the representation of 1 client will be directly adverse to another client or (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

R. Regulating Fla. Bar 4-1.7(a).

The commentary explains that this rule prohibits a lawyer from "acting as an advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." Comments to R. Regulating Fla. Bar 4-1.7. Moreover, "[a]n impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined." *Id.* Thus, "loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent." *Id.*

This Court has stated in no uncertain terms that "[a]n attorney engages in unethical conduct when he undertakes a representation when he either knows or should know of a conflict of interest prohibiting the representation." *The Fla. Bar v. Scott*, 39 So. 3d 309, 316 (Fla. 2010). Rule 4-1.7 prohibits attorneys from representing concurrent adverse interests because "a client is entitled to his

lawyer's undivided loyalty" and "a lawyer should never place himself in a position where a conflicting interest may, even inadvertently, affect the obligations of an ongoing professional relationship." *Hilton v. Barnett Banks, Inc.*, No. 94-1036-CIV-T24, 1994 WL 776971, at *3 (M.D. Fla. Dec. 30, 1994) (citations and internal quotations omitted). Once a party seeking disqualification establishes that an attorney has violated Rule 4-1.7, disqualification is mandatory. *See id.* at *3 (holding that a "firm is per se ineligible to participate in an action if it has concurrently represented adverse interests at any point during the action") (citations omitted); *Lincoln Assocs. & Constr., Inc. v. Wentworth Constr. Co., Inc.*, 26 So. 3d 638, 639 (Fla. 1st DCA 2010) ("To disqualify a law firm from concurrently representing a party whose interests are adverse, a client need only show that an attorney/client relationship exists.").

The Third District dismissed much of this case law and Rule 4-1.7 itself, brushing aside the trial court's findings in its 18-page order, noting simply that "there is no evidence that Mr. Gerson and Mr. Hunter currently represent the respondents." *Broin*, 84 So. 3d at 1112. But abundant record evidence demonstrates that Gerson and Hunter created their conflict and proceeded directly against the interests and express wishes of multiple clients, including Young and Blissard, even before filing the petition and that today they continue to push these

claims against the interest of hundreds of other clients. *See also* R. Regulating Fla. Bar 4-1.2(a), 4-1.8(g) (requiring a lawyer to abide by the client's decision).

First and foremost, Blissard and Young reasonably considered Gerson and Hunter their counsel, and the trial court clearly found that they were both clients when those attorneys began their attacks against FAMRI. It is beyond any dispute that Blissard directly retained Hunter until he withdrew from her suit after she objected in the midst of 2010 to his efforts to raid FAMRI; the Third District even recognized that the attorneys represented one of the respondent flight attendants before they withdrew. *Broin*, 84 So. 3d at 1112. And while Gerson and Hunter denied ever "representing" Young, they never denied that they met with her, worked as a team with McGrane (her direct attorney) on his progeny cases, or that they filled in for McGrane while he served as Florida Bar president. (R3:500-02.)

Moreover, in light of the parties' agreement to try the issue based on affidavits, court pleadings, and documentary evidence, the trial court was free to accept the clear affidavit testimony from Young and McGrane that there was an attorney-client relationship. Indeed, even Gerson and Hunter's newsletters and "status letters" made clear that they were representing the individual flight attendant clients through a co-counsel team approach. They conceded in their response to the motion to disqualify that "all of the flight attendants and their counsel were united in a team effort." (R4:697.) Florida law is clear that such a

joint approach to litigation creates an attorney-client relationship. *See Visual Scene, Inc., v. Pilkington,* 508 So. 2d 437, 440 n.3 (Fla. 3d DCA 1987) (where group of attorneys and clients "pooled information" and worked together, sharing litigation information, "the attorney for one becomes the attorney for the other") Thus, Gerson and Hunter were attorneys for both Young and Blissard, and the only remaining question as to these clients is whether Gerson and Hunter were proceeding against their interests when the attack on FAMRI began.

Because Young and Blissard are FAMRI board members, an attack against FAMRI is an attack against their interests. Indeed, the petition Gerson and Hunter filed expressly sought relief based on accusations of mismanagement by the board. (*See* R3:511 (accusing FAMRI's board of "substantially deviat[ing] from the Court approved purposes and … misus[ing] the settlement funds").) Thus, from the moment Gerson and Hunter first contemplated going after FAMRI, which was no later than February 2010, they were contemplating attacking their own clients. Rule 4-1.7 flatly forbids this violation of a lawyer's most sacred duty, and nothing that happened afterwards could change this fact. While this conflict is all the more repulsive because it is entirely lawyer-driven and not client-driven, even if one of their clients had asked Gerson and Hunter to launch this attack, Rule 4-1.7(a) still would have prohibited that. *See Fla. Bar v. Moore,* 194 So. 2d 264, 269 (Fla. 1967) ("[A] lawyer represents conflicting interests ... when it becomes his duty, on behalf

of one client, to contend for that which his duty to another client would require him to oppose."); *accord Fla. Bar v. St. Louis*, 967 So. 2d 108, 121 (Fla. 2007); *The Fla. Bar v. Rodriguez*, 959 So. 2d 150, 160 (Fla. 2007).

Moreover, several of their other clients, while not FAMRI Board members like Blissard and Young, made Gerson and Hunter aware that any suit against FAMRI was also adverse to their interests. Gerson and Hunter do not dispute that they represented Chambers and Waerness until those clients registered their objections to this action. Yet Gerson and Hunter pursued and filed the petition, only withdrawing from representation of Chambers and Waerness later in an improper attempt to evade Rule 4-1.7's prohibition.

Not only should Gerson and Hunter have considered their clients' stated objections to the attacks on FAMRI, but the actual impact of the petition is unquestionably adverse to all of their individual clients. In the proceedings leading up to the disqualification order, there was no evidence that a single client had authorized the petition before it was filed, let alone all clients providing "informed consent," as also required by Rule 4-1.8(g). Indeed, the "status letters" soliciting their clients' consent to the petition were dated well after the petition was filed and were the first communication with many clients in a decade. (R3:506, 531, 573-81.) *See* R. Regulating Fla. Bar 4-1.3, 4-1.4, & 4-3.2 (requiring a lawyer to pursue a client's matter with diligence, timely communicate with clients, and to keep

pending litigation moving forward in an expeditious fashion). And even if a handful of clients had given their consent before the petition was filed, their consent must be "informed" to be valid as a waiver of conflict under Rule 4-1.7(b).

But the solicitation letters Gerson and Hunter sent were full of outright lies. They falsely contended that the Rosenblatts were the obstacle to the flight attendants receiving compensation from FAMRI, that the class settlement only provided members with reduced legal rights in the progeny actions, and that the Broin settlement agreement could be modified to provide members compensation when the *Ramos* opinion and the settlement agreement itself made clear that all of those representations were false. Rules 4-1.4(b) and 4-2.1 require a client's informed decision and a lawyer's candor. The Rosenblatts sought compensation for the flight attendants, but the tobacco companies refused and insisted on a non-modifiable agreement that would not result in any compensation to individual flight attendants. Indeed, Philip Morris even filed a response to the petition reiterating its firm opposition to any attempt to modify the settlement agreement.

The only legal right surrendered by the class was the right to seek punitive damages. But the *Ramos v. Philip Morris Cos., Inc.*, court already explained that this was not giving up much because the class was likely to lose those claims anyway. 743 So. 2d 24, 31-32 (Fla. 3d DCA 1999). Moreover, the court emphasized that in return class members were gaining substantial additional legal

rights in their individual actions, such as getting a presumption in their favor on general causation and obtaining a waiver of the statute of limitations defense that the *Ramos* court indicated was otherwise likely to defeat most, if not all, of the flight attendants' claims. *Id.* Thus, not only did Gerson and Hunter fail to fully inform their clients about their attacks on FAMRI, but these attacks threaten to undo the entire settlement by undermining what the tobacco defendants have always claimed was a material term.

Accordingly, Gerson and Hunter's actions from February 2010 when they started their informal attack on FAMRI through the formal petition filed in December 2010 to this day are actions directly adverse to the interests of all of the flight attendant clients. Two major adverse consequences would result if this attack were to ever succeed, both of which needed to be communicated to all clients **before** informed consent could be provided.

First, FAMRI continues to fund research that seeks the early diagnosis, treatment, and cure of diseases the flight attendants may now or in the future suffer from as a result of their exposure to cigarette smoke. The organization's dissolution would halt that research and close the multiple facilities located throughout the United States where flight attendants receive free screenings for an assortment of diseases. This research and screening is of unquestionable importance to most, if not all, of the flight attendants.

Second and equally insidious, Gerson and Hunter's attack risks undoing the very settlement that provided substantial benefits to the class members. The settlement agreement provides that if any court modifies it, it becomes void and the parties are returned to their status before the agreement was entered. The major settling tobacco defendant, Philip Morris, has already objected to the agreement being modified. Were the tobacco companies to claim a violation of the settlement agreement, they would likely seek the return of FAMRI funds and a rescinding of all the other "abundant" benefits recognized by *Ramos*. 743 So. 2d at 31. Thus, Gerson and Hunter's petitions, if successful, threaten to leave their clients not only without any compensation but also exposed to statute of limitation defenses and heightened burdens of proof in their still-pending individual lawsuits. The adverse consequences are enormous and require Gerson and Hunter's disqualification.

That Gerson and Hunter continue to prosecute the petition despite many of their client's objections and the potentially dire consequences to FAMRI and the Broin settlement's disintegration, while failing to inform their clients of these consequences, demonstrates that Gerson and Hunter are motivated by interests beyond their clients' benefits. *See* R. Regulating Fla. Bar 4-1.7(b) (prohibiting a lawyer from placing his own financial interests over those of his client); *St. Louis*, 967 So. 2d at 115. Having found it difficult and expensive to actually try their clients' individual lawsuits without underwriting from a 501(c)(3) nonprofit

foundation, Gerson and Hunter designed a scheme to get them out of that responsibility and possibly earn a nice fee by liquidating FAMRI. As their letters show, they hoped to get 30% of $100 million. Gerson and Hunter impermissibly place their personal interests—a chance at a $30 million payday if FAMRI is dissolved—ahead of the interests of their current clients, violating Rule 4-1.7.

This Court held recently that comparable conduct violated Rule 4-1.7 and an attorney's duty of loyalty to his clients. In *The Florida Bar v. Adorno*, the Court considered whether an attorney violated Rule 4-1.7 and related rules of conduct by negotiating the settlement of a purported class action on behalf of the select putative class members and to the exclusion of the remainder of the putative class. 60 So. 3d 1016, 1028 (Fla. 2011). The Court suspended the attorney for three years for violating Rule 4-1.7 because he had "focus[ed] on the interests of the named plaintiffs during settlement discussions and abandon[ed] the putative class in order to achieve the $7 million settlement … [and] negotiated the settlement in a manner that resulted in a large fee for his firm and abandoned the putative class." *Id.*

Gerson and Hunter have effectively done the same. By seeking relief with the petition on behalf of only a small subset of their individual flight attendant clients and over the objection of other clients, they sacrificed their clients' interests in FAMRI and their individual lawsuits for their own benefit and (purportedly) the

benefit of the selected clients who consented to this scheme. These actions cannot be squared with the principles of *Adorno.*

In the proceeding below, Gerson and Hunter sought to evade the clear prohibition of Rule 4-1.7 regarding taking action against the interest of current clients by arguing that the current client test did not apply with regard to the flight attendants that they dumped upon learning of those clients' objections. As an initial matter, there were still hundreds of their current clients who never provided consent that were never the subject of any motion to withdraw representation.

Regardless, it should be beyond argument that a lawyer may not evade Rule 4-1.7 by simply dumping any client who has the conviction to object to her lawyer pursuing relief against her interest. But Gerson and Hunter argued for just that result by relying on the following comment to Rule 4-1.7:

> An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.6. When more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9.

That comment, however, provides no support because the conflict in this case existed before these lawyers chose to bring a claim against FAMRI. Thus, under the first sentence, the moment Gerson and Hunter first considered representing some flight attendants in an attack against FAMRI, they should have known they

would have to decline such representation. Instead, they pressed on and filed the petition.

Moreover, the second two sentences do not apply because the conflict here was not some unanticipated conflict that developed after the lawyers filed the petition. Case law from across the nation recognizes the deplorable nature of Gerson and Hunter's conduct. *See Hilton*, 1994 WL 776971, at *3 (holding that a lawyer may not convert current client into former client to escape application of Rule 4-1.7); *Harrison v. Fisons Corp.*, 819 F. Supp. 1039, 1041-42 (M.D. Fla. 1993) ("A lawyer may not evade ethical responsibilities by choosing to jettison a client whose continuing representation becomes awkward. Allowing lawyers to pick the more attractive representation would denigrate the fundamental concept of client loyalty." (citations omitted)); *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981) (noting that if the duty of loyalty did not prevent this practice "the challenged attorney could always convert a present client into a 'former client' by choosing to cease to represent the disfavored client"); *ValuePart, Inc. v. Clements*, No. 06 C 2709, 2006 WL 2252541, at *2 (N.D. Ill. Aug. 2, 2006) (emphasizing that a lawyer "may not simply to drop one client 'like a hot potato' in order to treat it as though it were a former client for the purpose of resolving a conflict of interest dispute"); *Davis v. Kraft Foods N. Am.*, No. Civ. A. 03-6060, 2006 WL 237512, at *13 (E.D. Pa. Jan. 31, 2006) (rejecting the

"untenable position" that a conflict with a current client can be resolved by dropping one client in order to represent another, more lucrative client); *Snapping Shoals Elec. Membership Corp. v. RLI Ins. Corp.*, No. 1:05 CV 1714-GET, 2006 WL 1877078, at *2 (N.D. Ga. July 5, 2006) (determining that a client that is dropped after being sued by his lawyer is considered a current client for purposes of conflict rules); *Strategem Dev. Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 794 (S.D.N.Y. 1991) ("Epstein Becker may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them. Nor may it seek consent for dual representation and, when such is not forthcoming, jettison the uncooperative client.").

Consistent with the overwhelming weight of authority, this Court should not condone Gerson and Hunter's withdrawal from Blissard's case, as well as their withdrawal from the case of any other client who objected to the petition. "Public confidence in lawyers and the legal system must necessarily be undermined when a lawyer suddenly abandons one client in favor of another." *Harte Biltmore Ltd. v. First Pa. Bank*, 655 F. Supp. 419, 422 (S.D. Fla. 1987). This Court should therefore join the other courts that "are generally in accord in refusing to permit a lawyer to withdraw from representing an existing client, short of the contemplated termination of the matter or in the absence of other justifications for withdrawal,

solely in order to represent another client." Restatement (Third) of the Law Governing Lawyers § 132 cmt. c (2000).

For all of these reasons, the trial court followed the essential requirements of the law when it disqualified Gerson and Hunter based on Rule 4-1.7 and the conflicts with their current clients.

B. Alternatively, Rule 4-1.9 Applies Because Gerson and Hunter's Attempts to Modify the Broin Class Settlement Agreement Is Substantially Related to Their Pursuit of Individual Actions Pursuant to That Agreement.

Even if Gerson and Hunter were permitted to drop clients to evade the application of Rule 4-1.7, they were still properly disqualified under Rule 4-1.9. The Third District even recognized that Rule 4-1.9 applied, in the absence of its holding that this Court's rules are "inadequate" to cover the situation presented under these facts. *Broin*, 84 So. 3d at 1112. Under the test applicable to conflicts with former clients, this Court's jurisprudence flatly prohibits a lawyer from proceeding against former clients in a matter that is substantially related to the matter in which they had represented those clients. *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991); R. Regulating Fla. Bar 4-1.9(a). Because Gerson and Hunter had clients who objected to the petition, and because the petition – by Hunter and Gerson's own repeated admissions – is substantially related to the individual clients' lawsuits, Rule 4-1.9 required disqualification.

Rule 4-1.9(a) prohibits an attorney who formerly represented a client in a matter from subsequently "represent[ing] another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." Florida law does not require a party seeking disqualification pursuant to Rule 4-1.9 to show actual prejudice to the former client as a result of the subsequent representation. *K.A.W.*, 575 So. 2d at 634. Instead, a party seeking to disqualify an attorney for violating Rule 4-1.9(a) must show only (1) the existence of an attorney-client relationship, which "giv[es] rise to an **irrefutable** presumption that confidences were disclosed during the relationship" and (2) that the matter in which the attorney represented an interest adverse to his or her former client was "the same or substantially related to the matter in which it represented the former client." *Id.* at 633 (emphasis added).

As to the first prong of this analysis, there is no colorable dispute that Gerson and Hunter previously represented Blissard, Chambers, Spurgeon,[5] and Waerness in their progeny actions. And the trial court's finding that Young had an attorney-client relationship with Gerson and Hunter, based on these attorneys' own

[5] Gerson's claim that he never represented Spurgeon when he admitted filing her progeny action is specious. (R16:3139.) She only became a "former client" because he allowed her action to be dismissed for lack of prosecution in 1998 without ever advising her, as evidenced by her 2010 email in which she demonstrated that she thought he was still pursuing her case. (R12:2351.)

statements, was not clearly erroneous. Gerson and Hunter affirmatively sought withdrawal from Blissard, Chambers, and Waerness's cases. Not only does that demonstrate that they represented those clients, but it also demonstrates the attorneys' recognition that the petition was adverse to the interests of these clients, bringing the analysis to the second prong of the test. (R1:23-24, 45; R3:487-88, 528, R4:771; R10:1789.) Even Gerson and Hunter recognized that they could not simultaneously pursue the petition and represent the interests of their clients who opposed it.

Gerson and Hunter argued at the Third District that the petition was not substantially related to the individual cases of their "previous" clients. But that argument is directly belied by other representations they made there and throughout the litigation below. Gerson and Hunter have repeatedly conceded that the petition is "directly related" (their own words) "to approximately 3,000 or less pending individual actions filed by Broin class member flight attendants." (R12:2368.) Indeed, the very solicitation letters they sent to their clients asking them to join the already filed petition were framed as "status updates" for the individual suits and "for the best way [sic] bring this [progeny] litigation to a successful conclusion." (R3:573-581.) The earlier proposed petition was described by them as a means of "closure for the Flight Attendant Litigation." (R12:2301.)

And their concessions are correct – the two proceedings are inextricably intertwined such that the impropriety of Gerson and Hunter's actions is apparent. "Substantially related" for Rule 4-1.9 requires that a prior matter "need only be akin to the present action in a way reasonable persons would understand as important to the issues involved." *McPartland v. ISI Inv. Servs., Inc.*, 890 F. Supp. 1029, 1031 (M.D. Fla. 1995) (citations omitted). Whether two matters are substantially related depends on the facts particular to each situation. *Fla. Bar v. Dunagan*, 731 So. 2d 1237, 1240 (Fla. 1999).

The progeny actions were authorized by the Broin settlement and Gerson and Hunter's clients accepted the benefits of the settlement by filing individual lawsuits. (R1:178; R6:1133-R9:1727.) And the basis for the attacks on FAMRI is that FAMRI, which was created pursuant to the settlement agreement, had "substantially deviated from the Court approved purposes" and was at fault for the flight attendants' loss of their progeny lawsuits. (R3:511, 517-18.) Gerson and Hunter initially viewed the nonprofit as a funding source for flight attendant litigation and later as an exit strategy from that litigation. (R3:476-77, 573-81.) These uncontroverted facts demonstrate that the trial court did not clearly err in finding the individual progeny actions to be substantially related to the petition.

Accordingly, Gerson and Hunter's representation on the individual claims of Young, Blissard, and the other flight attendants who had interests adverse to the

petition were very closely related to their current attempts to raid FAMRI. Any possible doubt on this issue is removed by the sworn statements of Young, Blissard, and McGrane that in the course of this prior representation, Young and Blissard trusted their lawyers and disclosed confidential inside information about FAMRI's inner workings and funding decisions, which was used in the petition against FAMRI. Thus, there should be no doubt that the trial court properly found that the former client conflict rules required Gerson and Hunter's disqualification.

CONCLUSION

For the foregoing reasons, this Court should quash the decision below and remand with directions to deny Gerson and Hunter's certiorari petitions.

Respectfully submitted,

/s/ John S. Mills

John S. Mills
Florida Bar No. 0107719
jmills@mills-appeals.com
Andrew Manko
Florida Bar No. 018853
amanko@mills-appeals.com
Courtney Brewer
Florida Bar No. 0890901
cbrewer@mills-appeals.com
service@mills-appeals.com (secondary)
The Mills Firm, P.A.
203 North Gadsden Street, Suite 1A
Tallahassee, Florida 32301
(850) 765-0897 Telephone
(850) 270-2474 Facsimile
Counsel for FAMRI

Christian D. Searcy
Florida Bar No. 158298
ksx@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
Counsel for FAMRI

David J. Sales
Florida Bar No. 794732
david@salesappeals.com
1001 N. U.S. Highway 1, Suite 200
Jupiter, Florida 33477
(561) 744-0888 Telephone
(561) 744-0880 Facsimile
Counsel for FAMRI

John W. Kozyak
Florida Bar No. 200395
jwk@kttlaw.com
Thomas A. Tucker Ronzetti
Florida Bar No. 965723
tr@kttlaw.com
Rachel Sullivan
Florida Bar No. 815640
rs@kttlaw.com
Jessica E. Elliott
jee@kttlaw.com
mcm@kttlaw.com (secondary)
Kozyak Tropin & Throckmorton, P.A.
2525 Ponce De Leon, 9th Floor
Coral Gables, Florida 33134
(305) 372-1800 Telephone
(305) 372-1800 Facsimile
Counsel for FAMRI

Miles A. McGrane III
Florida Bar No. 201146
miles@mcgranelaw.com
lisa@mcgranelaw.com
The McGrane Law Firm
Datran One, Suite 1500
9100 S. Dadeland Blvd.
Miami, Florida 33156
(305) 374-0003 Telephone
(305) 397-2966 Facsimile
Counsel for Patricia Young

Roderick N. Petrey
Florida Bar No. 128918
rnpetrey@aol.com
508 Castania Avenue
Coral Gables, Florida 33146
(305) 479-9525 Telephone
Counsel for Alani Blissard

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following persons by e-mail on March 1, 2013:

Philip M. Gerson, Esq.
pgerson@gslawusa.com
Edward S. Schwartz, Esq.
eschwartz@gslawusa.com
Counsel for Respondents (3D11-2129)

Marvin Weinstein, Esq.
michele@gwtatlaw.com
Counsel for Intervening Flight Attendants Supporting FAMRI

Kelly Anne Luther, Esq.
kluther@kasowitz.com
Counsel for Liggett Group

David Ross, Esq.
rossd@gtlaw.com
Counsel for Lorillard Tobacco Co.

Stephanie E. Parker, Esq.
separker@jonesday.com
Counsel for R.J. Reynolds Tobacco Co.

Steven Hunter, Esq.
shunter@hunterwilliamslaw.com
Counsel for Respondents (3D11-2141)

Mark J. Heise, Esq.
mheise@bsfllp.com
Counsel for Philip Morris USA Inc.

Edward A. Moss, Esq.
emoss@shb.com
Kenneth Reilly, Esq.
kreilly@shb.com
Counsel for Philip Morris USA Inc.

Douglas Chumbley, Esq.
dchumbley@carltonfields.com
Counsel for R.J. Reynolds Tobacco Co.

/s/ John S. Mills
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ John S. Mills
Attorney