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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

REPLY BRIEF OF ALANI BLISSARD

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

Counsel for Alani Blissard

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STATEMENT REGARDING SEPARATE BRIEFS

Petitioners FAMRI, Young, and Blissard joined in a single initial brief, but find separate reply briefs necessary to address the nearly 100 pages of separate answer briefs. They have coordinated to avoid duplication and thereby lessen the burden on the Court. The reader will likely find the three reply briefs most helpful by beginning reading FAMRI's reply brief first, Young's brief second, and Blissard's brief last.

ARGUMENT

FAMRI having addressed most of the issue not uniquely affecting Young and Blissard and Young having addressed issues unique to her and other clients of the team effort by Gerson and Hunter and their co-counsel, Blissard, who unquestionably was directly represented by Hunter, files this reply brief to focus on the remaining legal and factual issues raised by the answer briefs.

I. RULE 4-1.7 DID NOT PERMIT HUNTER TO DEVISE A NEW THEORY OF RELIEF AGAINST HIS CURRENT CLIENT, LANI BLISSARD, WITHDRAW AT WILL FROM HER REPRESENTATION BECAUSE BLISSARD OBJECTED TO HIS BETRAYAL, PROCEED WITH THE NEW REPRESENTATION BY FILING A PETITION AGAINST BLISSARD AND THEN PROCURE CONSENT FROM FLIGHT ATTENDANT CLIENTS TO AUTHORIZE THE PETITION AGAINST BLISSARD

It is undisputed that Lani Blissard's decade-long lawyer, Hunter withdrew as her counsel in her pending litigation in June, 2010, dumping her as a client after a decade so he could undertake a new, more lucrative representation *against Blissard* and the nonprofit foundation where she serves as a trustee/director. Hunter and Gerson erroneously insist that the Florida Rules of Professional Conduct and specifically the comment to Rule 4-1.7 authorize them to do so.

Hunter defends his betrayal of his client by relying on the comment to Rule 4-1.7, addressing unforeseen conflicts that arise *after* a representation has been undertaken, where an attorney may be permitted to withdraw. But the conflicts here arose long *before* this new representation against FAMRI and its board had

been undertaken, while the petition was in its planning stages. Hunter and Gerson describe the petition as a new "entirely distinct matter," (Gerson Br. at 33; Hunter Br. at 40). Rule 4-1.7 does not permit counsel to withdraw from a current representation to undertake representation of a new matter, whether the new matter involves current or new clients. The first sentence of the comment to the rule, omitted by Hunter and Gerson in their answer briefs, cautions that "an impermissible conflict of interest may exist *before* representation is undertaken, in which event the representation should be declined." The latter sentence disposes of these lawyers' skewed arguments in the answer briefs' about curing conflicts by withdrawing from one current client to sue another client in a new matter. *See The Florida Bar v. Scott*, 39 So. 3d 309, 316 (Fla. 2010) ("An 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."); *accord The Florida Bar v. Brown*, 978 So. 2d 107, 113 (Fla. 2008).

Hunter could not cure his conflict absent Blissard's consent, which was certainly not provided. Nor could their withdrawals from a series of flight attendants' individual lawsuits cure the conflicts Hunter had with Chambers or Gerson's conflicts with Waerness and Spurgeon.[1] Each of these conflicts, standing

[1] Gerson admits he filed Spurgeon's lawsuit but claims to have done so "as a courtesy at the request of Mr. Rosenblatt on the eve of the expiration of the statute of limitations." (Gerson Br. at 19; R6:1006) But Gerson filed *390 additional*

alone, warrants disqualification. Each of the multiple clients was separately owed a duty of loyalty. *Brent v. Smathers*, 529 So. 2d 1267, 1269 (Fla. 3d DCA 1998) ("Common representation does not diminish the rights of each client in the lawyer-client relationship. Each has a right to loyal and diligent representation"). Nor could Hunter and Gerson file the petition in December, 2010 without the consent of *all* of their over 1000 flight attendant individual clients, each of whom will be impacted by any modification of their 1997 class-wide settlement. Yet counsel for the conflicted lawyers at the disqualification hearing revealed (through an unsworn oral representation) that they had obtained consent from only approximately 400 clients, less than half. Here, only 261 clients of their over 1000 clients are listed as parties in these appellate proceedings, representing less than 26% of their clients

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lawsuits on September 6, 2000, the same date he filed Spurgeon's case, 74 lawsuits a day later on September 7, 2000 and the balance of his 618 were filed before 9/6 (R6:1133-R9:1727). Gerson is dismissive of Spurgeon since he says she "never executed his retainer agreement," so he let her case be dismissed for lack of prosecution in 2008, never notifying her of the dismissal, and stating "no attorney client privileged relationship ever existed," (R6:1006), (though he filed her lawsuit and sent her his "dear client" solicitation letter even after her objections to the petition). Gerson clearly owed a continuing duty of loyalty to Spurgeon under Florida law. The dismissal of her lawsuit for lack of prosecution was not an ethical exit strategy for Gerson. *See The Florida Bar v. Jordan*, 705 So. 2d 1387 (Fla. 1998) (one year suspension for attorney who neglected client's case and did not advise her it was dismissed for lack of prosecution); *In re Payne*, 707 F.3d 195, 213 (2d Cir. 2013) (counsel of record may not end representation through dismissal for lack of prosecution).

and only **.01%** of the original Broin class. Hunter and Gerson's conflicts are staggering as further demonstrated in FAMRI's reply brief.

Hunter and Gerson's actions violate Rule 4-1.7 and the accompanying comments, and their conflicts cannot be cured by withdrawing at will and without cause from Blissard's and other clients' cases to undertake the new representation against FAMRI. Decisions relied upon by Gerson and Hunter discussing the hot potato doctrine explain why disposing of clients in this fashion is unacceptable. *Pulsecard, Inc. v. Discover Card Services, Inc.*, 168 F.R.D. 295 (D. Kan. 1996); *Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1059 (1992). The hot potato doctrine has been effectively adopted in Florida by the comment to Rule 4-1.7. Here, the conflict is even more egregious since it was purely lawyer created and driven; nothing in the record indicate a single flight attendant asked Gerson and Hunter to undertake their attacks against FAMRI. Florida law does not permit Hunter to devise a new claim against his current client Blissard, withdraw from her representation to dodge his conflicts, effectively sue her for misconduct, and then procure plaintiffs from among his other current clients to join in. But that is exactly what Hunter and Gerson did at grave peril to their license to practice. *See The Florida Bar v. St. Louis*, 967 So. 2d 108, 111

(Fla. 2007) (disbarring counsel who improperly "created a conflict of interest" with his clients and then deceived his clients, the court and Florida Bar).[2]

II. IT IS CLEAR ERROR FOR THE THIRD DISTRICT TO HOLD THAT THE RULES OF PROFESSIONAL CONDUCT ARE "INADEQUATE," ADOPT A NEW BALANCING TEST FROM FEDERAL DECISIONS, REQUIRE A FINDING OF PREJUDICE FOR CONFLICT, AND HOLD THAT THE TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW FOR NOT APPLYING THE NEW BALANCING TEST

Hunter and Gerson deny the district court ruled as it did. The Third District found the Florida Rules of Professional Conduct on conflict to be "inadequate" and announced it was adopting a new balancing test for conflict, borrowing this test from a few class action settlement cases in federal court.(R26:4967) This was clear error. It is disingenuous for Hunter and Gerson to deny the district court's holding and insist that the decision below involved the "routine applications" of the Rules of Professional Conduct in Florida. (Hunter Br. at 25; Gerson Br. at 21-23, 34) There was nothing "routine" about what the district court did. The Third

[2] Thus, there is no reason for the Court to even reach consideration of Rule 4-1.9, governing conflicts with "former" clients. But if the Court were to consider Blissard or any of the other flight attendants who opposed the petition and were dumped, as having been converted into "former" clients, there clearly is a substantial relationship between the petition and individual lawsuits. The petition blames FAMRI for the loss of the nine individual flight attendants' trials, for failing to develop science on disease causation and refusing to provide financial assistance in the flight attendants' trials, and it is undisputed that these proceedings against FAMRI were designed as an exit strategy from the over 1000 lawsuits Hunter and Gerson filed over 13 years ago, less the approximate 25% of their cases dismissed for lack of prosecution.

District usurped the exclusive jurisdiction of this Court over the Rules of Professional Conduct by adopting a different and new balancing test to determine conflict, and it also usurped the role of the trial court by improperly serving as an appellate fact finder while administering its new balancing test de novo and holding that Judge Bagley departed from essential requirements of law for not applying the new balancing test. No Florida state court had ever used a balancing test to determine attorney conflict; disqualification was required, below, under the Florida Rules of Professional Conduct.

III. ADDITIONAL SKEWED FACTS REQUIRE CORRECTION

The remainder of this brief seeks to correct additional misstatements from the answer briefs that otherwise might mislead the Court as Gerson and Hunter's "dear client" solicitation letters seemed calculated to mislead their clients.[3]

1. The petition is an exit strategy from the flight attendant litigation and seeks to destroy the Broin settlement and FAMRI, not enforce it. Hunter and Gerson assert they seek to enforce the Ramos mandate and secure their clients' "guaranteed benefits" under the settlement. (Hunter Br. at 1, 5-11.) But there is an undisputed paper trail in evidence, from 1997 through 2011, that demonstrates

[3] As demonstrated in Young's reply brief, Hunter's record support for many of his false accusations against Blissard, FAMRI and its board, is the *Adams* unsworn putative class action complaint filed by Hunter's sole client here, Judith Adams and joined by Gerson's clients. It is blatantly improper to rest on that document as support for arguments directed to the propriety of a disqualification order entered before that complaint was even filed.

beyond doubt that this has always been about lawyers demanding money from the nonprofit foundation to enable them to profitably exit over 1000 pending flight attendants' cases without liability for abandoning the litigation. Two of Gerson and Hunter's former co-counsel, Miles McGrane and Marvin Weinstein recognized their conflicts and have opposed the petition. (R3:426; R4:676.) The other flight attendants' attorneys representing the majority of flight attendants in suit, also refused to join the petition. (R3:425.) The four attorneys brought in after the petition was filed have disassociated themselves from the case and directed they be removed from all service lists. (R20:3911-12.)

These two attorneys are the real parties in interest and their sole interest is FAMRI's research money. This is corroborated by the affidavit of Dr. David Burns, Senior Editor, author and reviewer of ten U.S. Surgeons General Reports on smoking and health, who attended a meeting with flight attendants' counsel in March, 2010 to discuss what could be done by FAMRI through research. (R4:647-664.) The attorneys expressed no interest in FAMRI's research: "The only issue of concern to the attorneys was achieving a transfer of funds to their control." (R4: 649.)

The solicitation letters establish that at the very times Gerson and Hunter moved to withdraw from their objecting clients' current lawsuits to try to dodge their conflicts, none of their 1032 clients had consented to or were *even aware* of

their counsel's plans to proceed against FAMRI and its board, including clients, Young and Blissard (R3:522-25, 540-43.)

Gerson and Hunter argue that their petition is to "enforce and administer the *Ramos* mandate," (Hunter Br. at 15; Gerson Br. at 10), and the Third District accepted that label and erroneously found that Gerson and Hunter "are not asking that the court undo the prior settlement." (R26:4976.) However, their petition sought the opposite -- to modify the settlement. A section of the petition, entitled: "EQUITABLE JUSTIFICATION FOR GRANTING MODIFICATION," alleges: "the average age of the individual flight attendant class member is 63 years .... Providing monetary compensation to the class members now, in the twilight of their lives, is fair and reasonable and would provide a substantial benefit to the class members." (R3:518-19). The petition requests that "the Court should order distribution of the settlement funds to class members." (R3:519.) The "dear client" letters similarly state the petition will "ask the judge to modify the original settlement agreement and to pay all available remaining funds to ... all other class members." (R3. 542.)

Distributing cash to class member is precisely what *Ramos* said could *not* be done, (R1:179), as more recently reaffirmed by "Settling Defendant, Philip Morris 2011 Statement with Respect to Petition for Modification." (R6:1119-23.)

2. The class action has been dismissed with prejudice for over 15 years – there is no longer a class, class representatives or class counsel. The underlying class action case was dismissed with prejudice in 1998, and its file destroyed. (R12:2276-78; R17:3186, 3274.) Gerson and Hunter's insistence that the Rosenblatts continue to represent the class and that Blissard and Young have continuing fiduciary duties as class representatives (Gerson Br. at 1, 31; Hunter Br. at 26, 38, 45) is not only false, but contrary to Gerson and Hunter's references below to the "former Broin class members" and to the Rosenblatts as "former class counsel." (R4:682-84, 686, 694, 701, R10:1783-84, 1794, 1797.) Former class representatives, Young and Blissard, and former class counsel, Susan and Stanley Rosenblatt, were not appointed in perpetuity to serve in their class capacities. Nevertheless, Hunter accuses Blissard and Young as having violated their "fiduciary duty to assist ... the other class members such as the present clients of Hunter," and to "not oppose them," seeking to impose on Ms. Blissard the "duty" to sue herself. (Hunter Br. at 45.). Young, Blissard, the Rosenblatts, and the other trustees have been serving on the board of FAMRI voluntarily, not under any compulsion or duty because of their former class capacities in the class action.[4]

[4] Hunter and Gerson's clients concede in their separate *Adams* action, as Hunter did in his certiorari petition below, that the *Broin* class action is long over and board members previously served as class representatives and class counsel. (R23:4163-88). Indeed, class (re)certification is sought in *Adams*. (R.4177-80.)

3. The Broin settlement provided for a nonprofit scientific research foundation; science does not come with guarantees. FAMRI was formed with court approval solely as a scientific research foundation pursuant to the *Broin* settlement agreement. (R1:103) FAMRI-funded research includes early detection, treatments, and cures for cancers, such as breast, throat, and lung cancers; cures and more effective treatments cannot be guaranteed.[5] The parties in the underlying class action agreed in 1997, with Court approval, to the formation of FAMRI, an independent nonprofit research foundation to be governed in accordance with laws governing other Florida nonprofit research foundations. The attack on FAMRI funded science in the answer briefs is a play on words, taking one sentence out of context from *Ramos v. Philip Morris*, 743 So.2d 24 (Fla. 3d DCA 1999), and is quite disingenuous. Hunter and Gerson, representing at most, .01% of the original *Broin* class, seek an "accounting" to analyze each of the hundreds of funded FAMRI grants to determine whether each grant provides "guaranteed benefits."

[5] Scientific research is a process, often a slow process, as evidenced by the "war against cancer" declared in 1971, and ongoing. FAMRI grants are reviewed through an independent peer review screening process, utilizing panels of scientists. The world-wide scientific communities also rely on FAMRI's thousands of peer reviewed publications appearing in prestigious medical journals. Hunter questions "What good is research" if no guaranteed results are conferred? (Hunter Br. at 14) Let him ask that to National Institutes of Health, the American Cancer Society, or the multitude of medical research foundations throughout the United States. Our government and society invest in medical and scientific research without guarantees.

Any such test would treat FAMRI differently from every other nonprofit funding institution.

4. There are no genuine conflicts between the 2009 and 2010 FAMRI Monographs – both reveal the large body of significant scientific research funded by FAMRI with thousands of peer reviewed publications in prestigious journals. Excerpts from two FAMRI Monographs are taken out of context and distorted; the monographs for 2009 and 2010 reveal (i) the scope and importance of FAMRI funded research to the former class and humanity; (ii) that each of the FAMRI Distinguished Professors are highly recognized, acclaimed leaders on issues of tobacco and health who extensively published and conducted important educational projects from their FAMRI awards, as revealed in FAMRI Monographs and other FAMRI publications that appear on the FAMRI website, (www.famri.org) that complement the monographs; (iii) that leading scientists and public health officials that testified in *Broin* or other tobacco and health litigation were not deemed ineligible or disqualified for FAMRI funding because they had previously assisted the former class in the litigation; (iv) that the flight attendant screening center at the University of California, at San Francisco has been in operation and available to flight attendants without charge since 2002-- the screening center at UCSF was not established, as Gerson contends, post-disqualification to satisfy Gerson and Hunter's complaints; (v) that the IELCAP

screening centers have always been available free of charge to nonsmoking flight attendants; and (v) that FAMRI "donations" to a hospital in Israel is funding for an advanced Lung Cancer Center of Excellence ["CARE"] at the Weitzman Institute of Science in Rechovot, Israel, with state of the art DNA and stem cell research that will hopefully help find cures for lung cancer, breast cancer, and other cancers, as well as for COPD (R1:182-R2:422). David Burns, M.D., the author, editor and reviewer for each of the Reports of the U.S. Surgeon General on the Health Consequences of Smoking since 1975, described FAMRI:

> FAMRI has not only fulfilled its mission statement but has also become of the most respected sources of funding for tobacco related research in the United States, funding hundreds of researchers in a broad distribution of institutions throughout Florida, the rest of the U.S. and several other countries, resulting in thousands of scientific publications. . . . It covers research projects to allow early detection and treatment of each of the multitude of diseases caused by exposure to tobacco smoke as well as centers specifically designed to study the early detection of heart and lung disease due to smoking with flight attendant class members specifically identified as participants in the research studies.

(R4:648-650).

5. The Rosenblatts have provided substantial assistance to the progeny lawsuits. Gerson and Hunter, who have essentially abandoned 1000 lawsuits they filed 13 years ago with no record activity in over 99% of the cases and approximately 25% dismissed for lack of prosecution, accuse the Rosenblatts of "abandoning" the flight attendants' litigation without citation to the record or

explanation of how that would be relevant. (Hunter Br. at 48). But the record reflects that the Rosenblatts appeared as additional counsel as needed, particularly in *Jett* where the rulings applied in all cases; they filed memoranda, argued motions, attended trials, provided guidance, and furnished the flight attendant team with free office and storage space at the Concord Building across from the courthouse for several years. (R.3:476, 499-500; R5:674.) Like the other ad hominem attacks in Gerson and Hunter's answer briefs, these false attacks on the Rosenblatts only highlight the misconduct of these lawyers and the propriety of the trial court's order disqualifying them.

Respectfully submitted,

/s/ Roderick N. Petrey

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 May 13, 2013:

John S. Mills
jmills@mills-appeals.com
Andrew Manko
amanko@mills-appeals.com
Courtney Brewer
cbrewer@mills-appeals.com
service@mills-appeals.com (secondary)
Counsel for FAMRI

Christian D. Searcy
ksx@searcylaw.com
Counsel for FAMRI

David J. Sales
david@salesappeals.com
Counsel for FAMRI

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.

John W. Kozyak
jwk@kttlaw.com
Thomas A. Tucker Ronzetti
tr@kttlaw.com
Rachel Sullivan
rs@kttlaw.com
mcm@kttlaw.com (secondary)
Counsel for FAMRI

Miles A. McGrane III
miles@mcgranelaw.com
lisa@mcgranelaw.com
Counsel for Patricia Young

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.

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

/s/ Roderick N. Petrey
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/ Roderick N. Petrey
Attorney