IN THE SUPREME COURT OF FLORIDA

BENJAMIN DAVID RUST,

Respondent,

Case Number: SC12-141 and SC11-1814

vs.

THE FLORIDA BAR

Complainant,

REPLY BRIEF

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STATEMENT OF CASE AND FACTS

The Respondent adheres to and adopts by reference in this Reply the Statement of the Case and of the Facts contained in his initial brief in this cause. In addition, the Respondent admits that he instructed his legal assistant to request insurance coverage and evidence of brake repair for the sole purpose of forming a client-lawyer relationship with Edgar Barillas and his wife, Marlene Cabrera who occupied the status "prospective clients". Based upon the Bar's Motion to Show Cause and this Court's order thereupon, there are only two issues before this Court 1) whether a request for insurance coverage without corresponding advice constitutes the unauthorized practice of law and 2) whether this Court's contempt order required the Respondent to notify "prospective clients" that had not formed a client-lawyer relationship with a retainer contract. All other alleged violations in the Bar's Reply Statement of Case and of Facts are not in issue and are alleged for the sole purpose of distraction and prejudice. For example, the Bar's argument and the Referees finding that the Respondent also engaged in unauthorized practice of law "when he counseled his clients about questions of liability and the measure of damages".

The record unequivocally establishes that the alleged counseling took place not when the respondent was suspended but when these "prospective clients" first came into the Respondent's office over a year earlier. (P280L9-25P281L123P262L23-25P263L1-18) The alleged client, Marlene Cabrera, was specifically asked if the Respondent gave her advice concerning her rights and she denied being so counseled. (P148L9-110) Another example was the Referee's false statement in his report that the Respondent failed to provide any of his clients with this Court's order of suspension but instead only provided a misleading letter. (P 97L2-7, 98L6, P126L7-13) (P126L7-13) (P253L2-5PP255 L4-10) (P 259 L4-9). This false finding was used as an aggravating factor for the additional two year suspension. All cites are the hearing transcript unless indicated otherwise.

ISSUE 1

Under the section entitled "Standard of Review", the Bar fails to recognize that the standard for review for legal conclusions is significantly different than findings of fact. A Referee's legal conclusions are subject to much broader review than findings of fact. Florida Bar in re Inglis, 471 So2d 38 (Fla. 1985) The Referee made a legal conclusion and not a finding of fact that requesting insurance coverage without giving corresponding legal advice constituted the unauthorized practice of law. The Bar reiterates the same argument previously accepted by the Referee that *Florida Bar v. Wolf,* 21 So.3d 15 (Fla. 2009) does not provide "a singular, universal definition of the practice of law" but that *Florida Bar v. Brumbaugh,* 355 So. 2d 1186 (Fla. 1978) "is still the rule of reasoning on this issue". This Court held that to constitute the practice of law an activity has to have two essential

components: (1) the giving of advice and (2) the nature of the advice or services *requires* knowledge greater than that of the average citizen.

In his report, the Referee specifically refused to apply this Court's definition and ruled that the giving of legal advice was not necessary for a finding of unauthorized practice of law. Instead, the Referee at the urging of the Bar ruled that the "breadth" of the definition found in this Court's earlier opinion in Brumbaugh supra gave him authority to assign his own definition. The Bar also ignores that this Court's definition of the practice of law has a second requirement that the advice and services must require legal skill and/or knowledge of law greater than that possessed by the average citizen. Here, the Bar produced no evidence that such a request met this definition. To the contrary, the Respondent produced evidence that requesting insurance coverage was a clerical act routinely performed by a legal secretary and therefore, this request did not require unique lawyer experience, education, and skill. (P295 L24-25, P296 L1-3), (P52 L4-9) and (Ex.4)(P52L4-9). Contrary to the Bar's Reply, attorney Sukhia did testify as an expert that requesting insurance coverage did not constitute the practice of law. (P224 L8-25, P225 L1-25, P226L1-4) The Bar does not address, nor can it address the argument that if an attorney's request for insurance coverage constitutes the practice of law, and then likewise, the converse would be true, a claimant (lay person) requesting insurance coverage would be engaged in the unauthorized practice of law. The Referee does not have discretion to ignore the teaching of this Court. Based upon the teachings of this Court, the Referee's decision as a matter of law must be reversed.

ISSUE 2

While this Court normally defers to the Referee to determine credibility, this deference is not appropriate where the Referee had no opportunity to evaluate the demeanor and credibility of the declarant, Edgar Barillas whose alleged hearsay statement that he signed a retainer contract is one of the grounds for the Referee finding of attorney-client relationship. At issue is both the credibility of the declarant of the hearsay statement and the person who testifies to the out of court hearsay statement. Without Mr. Barillas testifying as a live witness (affidavit only), the Referee is not in a superior position to this Court to determine his believability. Further, deference cannot be given to the Referee when there is no foundation to show that the declarant of the hearsay statement had "personal knowledge" of what he signed. Here, the Bar failed to introduce any evidence that Mr. Barillas could read English to differentiate a medical authorization from a retainer contract. Based exclusively on a single hearsay statement of a bar investigator, the Referee erroneously determined that husband and wife, Edgar Barillas and Marlene Cabrera, had signed a retainer contract, thereby requiring notification of Respondent's suspension. With this single piece of hearsay testimony, the Referee improperly rejected overwhelming evidence that this married couple was not actual clients but merely "prospective clients". Five (5) witnesses testified that the alleged clients did not sign a retainer contract and therefore were not actual clients. (P262 L7-25 P263, 264 L1-4) (Ex 4 par 6 and 7) (Ex 7) (P144 L24-25, P145 L3-9, P147 L19-23) (P49 L16-22) (P62 L7-25, P63 L1-16)

On the crucial issue of whether Barillas and Cabrera had signed a retainer contract, investigator Digon-Greer admitted that his interview failed to ask whether Hispanic declarants had "personal knowledge" of what they had signed. (P246 L17-24 and P247 L1-4,14-20) (P202 L15-25, P203 L1-3)(P202L13-25, P203L 1-3).

Florida Statute 90.604 provides: *"A witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter... ".*

Here, the Florida Bar introduced no evidence whatsoever that either Marlene Cabrera or Edgar Barillas could read the English language so as to have <u>personal knowledge</u> of the nature of papers signed. The Bar incorrectly contends that there was no evidence that these individuals could not read English. This statement is false! Mr. Barillas's affidavit had to be interpreted into Spanish and Ms. Cabrera affidavit states that her son had to interpret the same. Regardless, the Bar had the burden of introducing evidence that they could read English so as to have "personal knowledge". In it's Reply Brief, the Bar mentions in a cursory fashion this lack of proof but claims that it doesn't make any difference because the Referee found as a matter of law that a retainer contract was not necessary to establish attorney-client relationship. Both the Bar and the Referee totally ignore Rule 4-1.18(a) entitled "Prospective Client" which provides that "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client". "Prospective client" is not currently a client but may become a client in the future. A preliminary discussion explaining that representation would not be undertaken absent liability, insurance coverage and change in pre-existing

medical condition does not transform a "prospective client" to an actual client. Transformation can only be accomplished through a retainer contract. The Referee who was a former State Attorney specializing in criminal law apparently was not aware of Rule 4-1.5(f) entitled "Contingent Fees" that mandates that personal injury cases such as here must have a written contract containing certain provisions. Based upon this ground alone, the Referee's decision must be reversed.

ISSUE 3

The Bar erroneously claims that Florida Bar v. Fredericks, 731 So2d 1249 does not stand for the proposition that where an attorney denies the violation, the testimony of one (1) witness will not meet this burden unless such witness' testimony is corroborated by evidence of other facts or circumstances. The direct quote from Fredericks, supra reads: "that degree of evidence does not flow from the testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances".

Investigator Brown does not speak Spanish and therefore she was not competent to corroborate the testimony of the other investigator, Digon-Greer. Therefore, the Referee was left with the uncorroborated testimony of only one witness, Digon-Greer, who failed to determine whether the Hispanic declarants had "personal knowledge" of the document they signed because of their inability to read English.(P245 L17-19). In response to Respondent's argument that the Bar did not obtain corroboration of the alleged representation by obtaining this alleged retainer contract, it should be noted that Bar

counsel never even asked the witness, Marlene Cabrera, whether she possessed and brought to the hearing the document that she signed.(P143-151) The husband, Mr. Barillas, attached to his affidavit a medical authorization, not a retainer contract. (Exhibit 7) Since the hearsay impeachment testimony of the bar investigator lacks corroboration by evidence of other facts, the testimony of this one witness fails to meet the burden of proof. The Bar erroneously states "The Referee's findings were based upon more factors than the testimony of one witness and his assessment of the credibility of the witness." Yet, the Bar cannot direct this Court to any record evidence to support this claim. A hearsay statement without corroboration from declarant who lacked "personal knowledge" as to what they signed does not support the Referee's rejection of the Respondent's overwhelming evidence that these individuals were not actual clients but "prospective clients". Based upon the foregoing, the Referee's report must be reversed.

ISSUE 4

Without any substantive evidence that the alleged clients signed a retainer contract, the Bar successfully persuaded the Referee that the Respondent should be held in contempt because this Court's order required notification of any person who "subjectively believed" that they were a client. To support the Referee's legal conclusion, the Bar again cites *Florida Bar v. Beach,* 675 So.2d 106 (Fla. 1996), for the proposition that a client's "subjective belief" of an attorney-client relationship required the Respondent to provide notification of suspension. Simply, Beach, supra does not stand for this proposition and this Court's order imposed no such requirement. Even assuming such an interpretation

which is denied, the record evidence will not support that the alleged clients held such a "subjective belief". *See* Exhibit 7 Edgar Barillas affidavit, *see* Exhibit 4 affidavit of J.V. Noriega, Respondent's testimony (P262 L12-25, P263 L1-18) and Marlene Cabrera (P144 L24-25, P145 L3-9). Bar counsel specifically asked Marlene Cabrera about her subjective belief: *Q. Did you consider Mr. Rust your attorney? A. ...I never considered that he was my lawyer because I never signed a contract. And I don't know much about laws or legal proceedings but I understand that the lawyer, when you sign a contract, is when you have a lawyer representing you.* (P147 L19-23).

The Bar directs this Court to the Referee's report claiming that there were a "litany of facts" contained therein which would support this subjective belief. However, the Bar does not and cannot provide record evidence to support the Referee's statement that they "consulted him as their attorney, relied upon his advice, and consented for him to act as their attorney." The record evidence is to the contrary. When these individuals first came into the office, the Respondent advised them that he would not undertake representation unless there was insurance coverage and liability. (P262L23-25,P263L1-18) This advice did not transform these "prospective clients" into actual clients.

ISSUE 5

The Bar argues that "again Respondent attempts to narrow the provisions of this Court's order by trying to argue the only clients that had to be notified were those with a retainer contract". It is well established that when a finding of contempt is based upon a violation of a court order, that order must be one which clearly and definitely makes the

person aware of it's command. *Rojo v. Rojo*, 84 So.3d 1259 (Fla. 3d DCA 2012) This Court's order did not mandate notification to "prospective clients" but to actual clients. The Bar argues that the Referee was justified in rejecting the affidavit of the Respondent's former legal assistant, J.V. Noriega, since his affidavit conflicted with the evidence. The affidavit read:

"*pursuant to the Respondent's directions, the affiant prepared notification materials*" to "*all clients of the Respondent at the time of the Order's effect*" and "*that the Respondent did not direct the Affiant to exclude any clients...from the advisory notice*"

The Referee falsely stated in his report that the Respondent failed to provide any of his clients with this Court's order of suspension but instead only provided a misleading letter. This contrived conflict was the primary basis for rejecting this affidavit. This statement by the Referee was false and refuted by numerous witnesses who testified that they received a copy of the Court's order of suspension. (P 97LL2-7, 98L6, P126L7-13) (P126L7-13) (P253LL2-5,P255L4-10)(P259 L4-9). Likewise, attorneys testified that they too received the order. Rather than being intellectually honest that the Referee erred in rejecting this evidence, the Bar perpetuates this falsity by stating "Few if any of the Respondent's clients could positively state they had received a copy of the Court order". To use the Bar's language, this is not a "mundane" mistake. The crucial issue is whether the Respondent intended to violate this Court's order. Because of the number of witnesses and the exclusive nature of their testimony, the inescapable conclusion is that the Referee's false statement was not a mere oversight but evidence of prejudice. The degree of prejudice is immaterial. Any verdict stained by prejudice to any degree must be reversed.

Here, the Referee admitted that his state of mind had been influenced by the prior Referee's report. (P276L19) If the Respondent was intending to violate this Court's suspension order, it makes no sense that he would fully and conscientiously convey his suspension to all his substantial clients but intentionally conceal it from the one couple whose case was had a minimal prospect of recovery. Under these circumstances, the Referee's findings were false, lacking in evidentiary support and tainted by self-admitted prejudice and therefore, this Court must substitute its judgment for that of the Referee.

ISSUE 6

Succinctly, the Bar claims that the admission of hearsay testimony upon which the Referee rejected the Respondent's entire defense is not prejudicial because the Referee found that a retainer contract was not necessary to establish attorney client relationship and secondly, the Respondent was able to present hearsay affidavit evidence of Edgar Barillas and J.V. Noriega. Based upon this single piece of hearsay testimony, the Referee rejected Edgar Barillas' affidavit, the Respondent's testimony, the affidavit of J.V. Noriega, and both Marlene Cabrera's affidavit and hearing testimony and all of the corroborating witnesses. The Bar does not deny that the Respondent was led to believe that Edgar Barillas would be present at the hearing and thereby affording the Respondent the opportunity to refute the hearsay testimony that he signed a retainer contract. Instead, the Bar claims that there was no prejudice because the Respondent was allowed to present the witnesses affidavit. This argument overlooks one salient fact, that the Referee disbelieved the affidavit on this crucial issue of whether he signed a retainer contract. Certainly, to

quote the Bar, the Respondent "did not get the better of it". The Bar argues that the prejudice to the Respondent should be overlooked because the Referee treated the parties equally by allowing the Respondent to present the affidavit of J. V. Noriega which was likewise disbelieved by the Referee. The record demonstrates that the circumstances are dissimilar. Approximately three weeks prior to hearing, the Bar was advised by email that the Respondent would be presenting the affidavit testimony of J.V. Noriega and that this witness would make himself available for deposition if counsel wished to challenge his affidavit. This invitation was declined. The Referee later at the Bar's motion in limine granted the Bar permission to take this witness's deposition and the bar declined again.

Based upon *Wilner v. Committee on Character and Appellate Division of Supreme Court of New York*, 373 U.S. 96, 83 S.Ct.1175, 10 L.Ed 2d 224 (1963) and In *Fla. Bar v. Centurion,* 801 So. 2d 858 (Fla.2000), the Referee's abused his discretion and the contempt finding must be set aside.

ISSUE 7

The Bar erroneously claims, "there is no requirement in the rule that any further method of authentication is needed". To support this argument, the Bar quotes an isolated section of the of the Rule 3-7.6(q)(5) that "a party shall file a statement of costs incurred in a referee proceedings and a request for payment of same within 15 days..." . The Bar breaks off the quote because its statement of costs was premature and otherwise in violation of this section. The Bar further fails to quote in the same section of the rule that "the party from whom costs are sought shall have 10 days from the date the motion was

filed in which to serve an objection". The Bar also fails to quote Rule 3-7.6(q)(3) entitled "Assessment of Bar Costs" which provides:

"*... the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated*".

Clearly, when the Bar rules on costs are read in context, upon timely objection by the Respondent, the burden shifted to the Bar to address that objection. Here, the Respondent timely objected to lack of authentication and the Bar failed to address that objection. Therefore, the Bar's award of costs must be reversed.

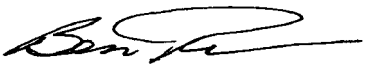
ISSUE 8

The Bar recognizes that the Referee's finding that the Respondent failed to notify the alleged clients for financial motive makes absolutely no sense whatsoever in light of that case having no prospect of recovery and that the Respondent had notified other clients whose prospect of recovery was excellent. In an attempt to address this irreconcilable conflict, the Bar makes two false statements: 1) "the respondent fails to demonstrate that this case had no value or no chance of recovery" and 2) "the cases that Respondent withdrew from were cases that he had appeared in as counsel and was therefore required to notify judges and opposing counsel". The Bar's own complainant insurance adjuster testified that there was little prospect of recovery of attorney's fees. (P114 L2-13, L7-25, P115 L1-2). The Respondent had no plausible motive to risk suspension in pursuit of such a speculative and minimal claim. The only evidence in the record was that these two individuals had never become clients and had never entered into a contract and therefore, were not notified of the suspension. Secondly, contrary to the Bar's false statement, neither

Maggie Lippman's or Chidi Ezeanya's cases were in suit, thereby forcing notification. To make this claim without supporting evidence is reprehensible. The Bar also falsely states that "Respondent responded that he had no intention of doing anything about the website that was holding himself out as a member in good standing with the Florida Bar". The record evidence is in direct contradiction to this statement. (P289,290,291,292,293) Vicarious liability, if any for a legal assistant only sending the suspension order to clients with contracts does not rise to the level of an intentional violation warranting permanent disbarment.

CONCLUSION

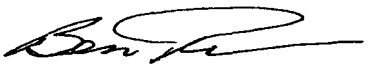
Based on the reasons and authorities set forth above, it is respectfully submitted that Referee's contempt finding and award of costs be set aside.



BENJAMIN D. RUST
Florida Bar No. 0183800

CERTIFICATE OF SERVICE

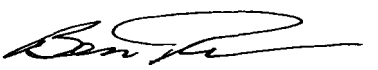
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery this 25 day of February to Jim Watson, counsel for The Florida Bar, 651 East Jefferson Street, Tall., Fl, 32399.



BENJAMIN D. RUST

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the size and style of type used in this Petition is: Times New Roman Font in 14 Point Type.



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