

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case No. SC16-1323

Complainant,

The Florida Bar File No. 2014-70,056 (11G)

v.

JOSE MARIA HERRERA,

Respondent.

**ANSWER AND AFFIRMATIVE DEFENSES AND
MOTION FOR MORE DEFINITE STATEMENT**

Respondent, Jose M. Herrera, Esq. ("Mr. Herrera"), by and through the undersigned counsel, hereby files this Answer and Affirmative Defenses to The Florida Bar's Complaint, and files this Motion for More Definite Statement:¹

ANSWER

1. Admit.
2. Admit.
3. Admit that there was a finding of probable cause. The remaining allegations are denied.
4. Denied.
5. Denied.

¹ The Florida Bar consented to this Answer being filed by September 2, 2016.

6. Admit that the *Bermudez* case was a wrongful death case and that Ms. Billie and her father are members of the Tribe, and that Lewis Tein was counsel in the *Bermudez* case. The remaining allegations are denied.

7. Admit that Mr. Rodriguez is Plaintiffs' counsel in the *Bermudez* case and that the Plaintiffs obtained a judgment or judgments in the *Bermudez* case, and that Plaintiffs have made collection efforts. The remaining allegations are denied.

8. The court docket, filings, orders and findings in the *Bermudez* case speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned documents, the allegations in this paragraph are denied.

9. The hearing transcript in the *Bermudez* case speaks for itself, and to the extent the aforementioned document referred to in this paragraph is inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned document, the allegations in this paragraph are denied.

10. Admit that Plaintiffs in the *Bermudez* case obtained a judgment that was overturned on appeal. As for the remaining allegations, Mr. Herrera is without knowledge to affirmatively admit or deny the allegations and therefore said allegations are denied.

11. Any court determinations or statements that have been either reduced to written orders or transcribed, speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned documents, the allegations in this paragraph are denied.

12. Denied as to the aiding and abetting allegations directed to Mr. Herrera. In regard to the remaining allegations, the checks, court docket, filings, orders and findings in the *Bermudez* case speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned documents, the allegations in this paragraph are denied.

13. The court order(s), affidavits and checks in the *Bermudez* case speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned documents, the allegations in this paragraph are denied.

14. Mr. Herrera is without knowledge to affirmatively admit or deny the allegations in this paragraph and therefore the allegations are denied.

15. Denied.

16. Denied.

17. The sworn statement and assertions referred to in this paragraph speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned documents, the allegations in this paragraph are denied.

18. Mr. Herrera denies the allegations that Mr. Herrera concealed anything. And in regard to the court filings referred to in this paragraph (i.e. sworn statements and pleadings), they speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned documents, the allegations in this paragraph are denied.

19. Admit that Mr. Herrera filed a timeline. The remaining allegations are denied. In addition, the timeline, statements and other documents referred to in this paragraph, speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not

covered by the aforementioned documents, the allegations in this paragraph are denied.

20. Mr. Herrera admits that he objected to the production of certain documents referred to in this paragraph, and admits that he took sworn statements of Mr. Bert, and admits that he produced certain documents referred to in this paragraph after the court ordered the same. The remaining allegations are denied. In addition, the documents referred to in this paragraph speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned documents, the allegations in this paragraph are denied.

21. The court filings, hearing transcripts and court findings referred to in this paragraph speak for themselves, and to the extent the aforementioned documents referred to in this paragraph are inconsistent with the allegations set forth in this paragraph, and/or there are factual allegations in this paragraph not covered by the aforementioned documents, the allegations in this paragraph are denied.

22. Mr. Herrera admits that he asked the Court to take Judicial Notice. The remaining allegations are denied.

23. Denied.

AFFIRMATIVE DEFENSES²

As the First Affirmative Defense, Mr. Herrera asserts that at all times material hereto he acted in the good faith belief that his actions in the referenced litigation were ethical and proper.

As the Second Affirmative Defense, Mr. Herrera asserts that in regard to any of the alleged 6 rule violations cited by The Florida Bar in the Complaint that are intent rules, The Florida Bar must prove, by clear and convincing evidence,³ that Mr. Herrera intentionally engaged in the conduct that allegedly violated the rule, and thus The Florida Bar will be unable to meet this high burden.

As the Third Affirmative Defense, Mr. Herrera asserts that in regard to any Orders or findings by the Court that are referenced in the Complaint, they cannot be accepted as conclusive proof of the matters referenced therein, and thus the The Florida Bar must prove each and every allegation by clear and convincing evidence. See for example *The Florida Bar v. Calvo*, 630 So. 2d 548 (Fla. 1993); *The Florida Bar v. Vining*, 707 So. 2d 670 (Fla. 1998).

² Mr. Herrera reserves the right to amend this Answer as discovery proceeds to either assert additional defenses or withdraw any defenses stated herein.

³ See Florida Standards for Imposing Lawyer Sanctions Section 1.3; and *Florida Bar v. Neu*, 597 So.2d 266, 268 (Fla. 1992) (“In bar discipline proceedings, the referee must find the evidence of the lawyer’s misconduct proven by clear and convincing evidence.”).

As the Fourth Affirmative Defense, Mr. Herrera asserts that there is no violation of Rule 4-3.1 (Meritorious Claims and Contentions) because his actions were based upon law and fact and were not frivolous, and his actions cannot be deemed frivolous even if the facts were not first fully substantiated or if he believes that the client's position ultimately will not prevail. *See* the Comment to Rule 4-3.1.

As the Fifth Affirmative Defense, Mr. Herrera asserts that there is no violation of Rule 4-3.3 (Candor Toward the Tribunal) because Mr. Herrera did not knowingly⁴ make a false statement to the Court, and even if Mr. Herrera had a reasonable belief that evidence was false, that does not preclude its presentation to the trier of fact. *See* Comment to Rule 4-3.3 ("A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact.")

As the Sixth Affirmative Defense, Mr. Herrera asserts that there is no violation of Rule 4-3.4 (Fairness to Opposing Party and Counsel) because Mr. Herrera had a good faith belief under the law that the sworn statements subject to the Complaint fell within the evidentiary work product privilege which does not, and cannot, rise to the level of a bar violation. *See* Comment to Rule 4-3.4 ("[s]ubject to evidentiary privileges, the right of an opposing party, including the

⁴ The Florida Bar's Standards for Imposing Lawyer Sanctions defines "Knowledge" as the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

government, to obtain evidence through discovery or subpoena is an important procedural right.") There is also no violation of this rule because Mr. Herrera did not fabricate evidence or counsel anyone to testify falsely.

As the Seventh Affirmative Defense, Mr. Herrera asserts that there is no violation of Rule 4-8.1 (Maintaining the Integrity of the Profession; Bar Admission and Disciplinary Matters) because Mr. Herrera did not knowingly make a false statement of material fact and did not fail to disclose a fact necessary to correct a misapprehension known by Mr. Herrera to have arisen in the matter, and did not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.

As the Eighth Affirmative Defense, Mr. Herrera asserts that there is no violation of Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) because Mr. Herrera's actions were made in good faith. *See* Comment to Rule 4-8.4.

As the Ninth Affirmative Defense, Mr. Herrera asserts that there is no violation of Rule 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) because Mr. Herrera's alleged conduct was not discriminatory conduct committed while performing his duties in connection with the practice of law (i.e. discriminatory conduct directed towards litigants, jurors, witnesses, court personnel, or other

lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis). *See* Comment to Rule 4-8.4

MOTION FOR MORE DEFINITE STATEMENT

Mr. Herrera hereby files this Motion for Definite Statement, and states that Paragraph 23 of the Complaint (which is cited verbatim below and which is the last paragraph of the Complaint) sweepingly alleges that Mr. Herrera violated 6 separate bar rules “by reason of” all of the remaining 22 Paragraphs in the Complaint:

By reason of the foregoing, Respondent has violated the following Rules Regulating The Florida Bar: Rule 4-3.1 (Meritorious Claims and Contentions); Rule 4-3.3 (Candor Toward the Tribunal); 4-3.4 (Fairness to Opposing Party and Counsel); 4-8.1 (Maintaining the Integrity of the Profession; Bar Admission and Disciplinary Matters); 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) of the Rules Regulating The Florida Bar.

It is undisputed that each of the aforementioned 6 rules require separate and distinct factors that The Florida Bar must prove (by clear and convincing evidence), and despite the distinctions between the rules, The Florida Bar’s Complaint fails to factually allege how each of the 6 rules have allegedly been

violated. As such, Mr. Herrera respectfully requests that the Court Order The Florida Bar to specify which of the 23 Paragraphs in the Complaint are specifically being alleged in support of each of the 6 alleged rule violations.

WHEREFORE, Mr. Herrera respectfully requests that he be found not guilty of the rule violations pled in The Florida Bar's Complaint, and that he be awarded his costs in defending this proceeding.

Dated: September 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 1st day of September 2016, to counsel of record via the Court's e-portal system and via email, and was also served upon the Referee Judge, The Honorable Dava J. Tunis, via email.

/s/ Herman J. Russomanno III