O/A 6-3-87

SUPREME COURT OF FLORIDA

CASE NO: 69,398

DISTRICT COURT CASE NO: 85-2759

ANGEL, COHEN & ROGOVIN,

Petitioner,

vs.

OBERON INVESTMENT, N.V., etc.,

Respondent.

BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER ANGEL, COHEN & ROGOVIN

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INTRODUCTION

This brief is filed on behalf of the Florida Defense Bar Association as Amicus Curiae in support of the Petitioner, ANGEL, COHEN AND ROGOVIN. Petitioner ANGEL, COHEN AND ROGOVIN was the Defendant in the trial court legal malpractice action. Respondent OBERON INVESTMENTS, N.V. was the Plaintiff below. In this brief the parties will be referred to as Petitioner/Defendant and Respondent/Plaintiff as well as by name.

Unless indicated to the contrary, all emphasis has been supplied by counsel.

STATEMENT OF CASE AND STATEMENT OF THE FACTS

Florida Defense Bar Association accepts and adopts that statement of case and statement of the facts contained within the brief filed by Petitioner Angel, Cohen and Rogovin.

POINT ON APPEAL

WHETHER AN ATTORNEY OWES A DUTY, A BREACH OF WHICH WOULD BE NEGLIGENCE, TO A NON-CLIENT WHO IS NOT THE INTENDED BENEFICIARY OF THE ATTORNEY'S SERVICES AND WHOSE INTERESTS ARE ADVERSE TO THAT OF THE ATTORNEY'S CLIENT.

SUMMARY OF ARGUMENT

In its decision in OBERON INVESTMENTS, N.V. v. ANGEL, COHEN AND ROGOVIN, 492 So.2d 1113 (Fla. 3rd DCA 1986) the Third District Court of Appeal took an unprecedented step away from the privity requirement which Florida courts have enforced since the inception of legal malpractice actions. The OBERON decision not only abolishes the employment requirement which Florida courts have traditionally imposed, but also moves beyond the limited exceptions to the privity requirement which had been carved out across the country.

Prior to the OBERON decision, Florida appellate courts had required an employment relationship between the plaintiff and the defendant attorney in all cases except suits by intended beneficiaries of negligently drafted wills. See, McABEE v. EDWARDS, 340 So.2d 1167 (Fla. 4th DCA 1976). Other states have relaxed the privity requirement to establish a duty running from an attorney to a non-client where it was the intent of the client to benefit the non-client third party as the primary or direct purpose of the transaction or relationship. See, PELHAM v. GRIESHEIMER, 92 Ill.2d 13, 440 N.E.2nd 96 (Ill. 2nd Dist. 1982). However, all states have consistently refused to extend an attorney's liability to non-clients in adversarial situations or arms-length transactions. See, GOODMAN v. KENNEDY, 18 Cal.3rd 335, 556 P.2d 737, 134 Cal.Rptr. 375 (1976).

In moving beyond the established exceptions to the privity requirement the OBERON court has imposed an impossible burden upon attorneys. Now, not only must an attorney loyally

and zealously represent the interests of his client, he must also scrutinize his client's motive in performing a transaction and protect the interest of the other side. Fulfilling all of those duties while acting in accordance with the dictates of the Code of Professional Responsibility is an almost impossible task.

In addition to placing an onerous burden upon attorneys, the OBERON decision clearly magnifies an attorney's potential liability. Now, in practicing law an attorney is open to lawsuits not only from his client, and those non-clients whom he intends to benefit in performing his services, but also individuals who the attorney does not even know to exist. Such limitless liability will make the practice of law undesirable, if not impossible.

As the decision of the Third District Court of Appeal in OBERON INVESTMENTS, N.V. v. ANGEL, COHEN AND ROGOVIN, represents not only a departure from existing case law, but also an unprecedented and undesirable expansion of an attorney's responsibilities, the decision of the Third District Court of Appeal should be overruled. This Court should therefore remand this case with directions to enter judgment for the Petitioner, pursuant to the summary judgment that was originally entered by the trial court in this matter.

ARGUMENT

WHETHER AN ATTORNEY OWES A DUTY, A BREACH OF WHICH WOULD BE NEGLIGENCE, TO A NON-CLIENT WHO IS NOT THE INTENDED BENEFICIARY OF THE ATTORNEY'S SERVICES AND WHOSE INTEREST ARE ADVERSE TO THAT OF THE ATTORNEY"S CLIENT.

In its decision in OBERON INVESTMENTS, N.V. v. ANGEL, COHEN and ROGOVIN, 492 So.2d 1113 (Fla. 3rd DCA 1986), the Third District Court of Appeal took an unprecedented step away from the privity requirement which Florida courts have enforced since the inception of legal malpractice actions. For years prior to the OBERON decision, all Florida courts, including the Third District, had required that the plaintiff in a legal malpractice action prove: (1) the attorney's employment by the plaintiffs; (2) the attorney's neglect of a reasonable duty owed to the plaintiffs; and (3) that such negligence was the proximate cause of loss to the plaintiffs. LORRAINE v. GROVER, CIMENT, WEINSTEIN and STAUBER, 467 So.2d 315 (Fla. 3rd DCA 1985); DRAWDY v. SAPP, 365 So.2d 461 (Fla. 1st DCA 1978); ADAMS, GEORGE and WOOD v. TRAVELERS INSURANCE COMPANY, 359 So.2d 457 (Fla. 3rd DCA 1978); FREEMAN v. RUBIN, 318 So.2d 540 (Fla. 3rd DCA 1975); WEINER v. MORENO, 271 So.2d 217 (Fla. 3rd DCA 1973).

Even subsequent to the OBERON decision, the Third District Court of Appeal reiterated the employment requirement in its decision in GINSBERG v. CHASTAIN, 12 FLW 90, Case No: 85-1489 (opinion filed December 30, 1986, Fla. 3rd DCA). Although a narrow exception to the employment requirement has been recognized where the plaintiff is an intended beneficiary of a will negligently drafted by the decedent's

attorney, McABEE v. EDWARDS, 340 So.2d 1167 (Fla. 4th DCA 1976), Florida courts have otherwise refused to relax the privity requirement.

The reasons for relaxing the privity requirement to permit recovery by the intended beneficiary of a negligently drafted will are obvious. In its decision in McABEE, supra, the Fourth District Court of Appeal cited a decision by the Supreme Court of California, HEYER v. FLAIG, 70 Cal.2d 223, 74 Cal.Rptr 225, 449 P.2d 161 (1969) in explaining the rationale behind its decision:

> When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiary of the intended bequest. McABEE, supra at 1169, quoting HEYER, 449 P.2d at 164-165.

In situations where an attorney has drafted a will in a negligent fashion, the attorney will in most instances have been well aware of the potential plaintiffs and the nature of the damages that might be occasioned as a result of the attorney's negligence. Under the circumstances, since the will was essentially drafted in order to benefit the intended beneficiaries, the beneficiaries should clearly have a right of action (as third party beneficiaries) pursuant to the

employment contract between the attorney and his testator client.

In cases where the individuals who will ultimately benefit from the lawyer's services are not known to the lawyer at the time that the lawyer's services are performed, or where the lawyer could not reasonably contemplate reliance upon the services by persons other then his client, the courts of Florida have consistently refused to permit recovery by the non-client. This has been particularly true where the interests of the client and the non-client/plaintiff have not been identical but, on the contrary, have been antagonistic. Florida courts have refused to impose a duty upon an attorney representing one party in a transaction to the opposing party. For example, in ADAMS v. CHENOWITH, 349 So.2d 230 (Fla. 4th DCA 1977), the Court refused to recognize a legal malpractice action by the purchaser of property against the sellers' attorney.

In GINSBERG v. CHASTAIN, supra, the Third District Court of Appeal refused to impose liability upon an attorney for the negligent preparation of an agreement. In GINSBERG, the plaintiff did not retain the defendant attorney in connection with the preparation of the agreement; rather, the defendant attorney had been retained by the other party to the agreement. The Court noted that there was no evidence establishing an attorney/client relationship for legal services between Chastain and Ginsberg, and therefore determined that Chastain had no cause of action against Ginsberg for the

negligent preparation of the agreement.[1]

When the OBERON decision is considered in the context of the numerous decisions which preceded it and which have required the existence of privity, and the Third District's own subsequent decision in GINSBERG, the OBERON decision is inexplicable. The decision is particularly confusing in light of comments by the Third District in its earlier decision in LORRAINE, supra, where the Court explained that employment of the attorney by the plaintiff is typically a requirement in a legal malpractice action because: "(1) to allow such liability without privity would deprive the parties to the contract of control of their own agreement; and (2) a duty to the general public would impose a huge potential burden of liability on the contracting parties." LORRAINE, 467 So.2d at 117. It is respectfully suggested that the very policy reasons which persuaded the Court not to permit recovery in LORRAINE should also have precluded recovery in OBERON, particularly had the Court chosen to follow its own pronouncements on point.

The Third District's decision in OBERON essentially deprived the Angel law firm and Mr. Treister of control over their own agreement, and has instead made the Angel law firm the watchdog of Mr. Treister's conduct. The OBERON decision not only required the Angel law firm to endeavor to represent Mr. Treister competently in this transaction, it also

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[1]The Third District Court of Appeal did not discuss whether Ginsberg could reasonably have foreseen that Chastain would sustain injury if Ginsberg negligently drafted the subject agreement. Obviously, however, in almost every instance, at least one party to a transaction would suffer some sort of injury if the agreement is drawn in a negligent fashion.

effectively condemned the defendant attorneys to investigate, examine and judge the motives behind the transactions which Mr. Treister asked them to perform.

The obligations imposed by the OBERON decision place an impossible burden upon the attorney, i.e., the attorney must competently represent his client within the guidelines imposed by the Code of Professional Responsibility while simultaneously protecting the interests of those with whom the client is dealing. These other individuals may be on opposite sides of a transaction, as in this case, or actually in an adversarial posture vis-a-vis the attorney's client. The duty which has been imposed by the Third District therefore requires the attorney to effectively manuever between his own client and another individual whose interests may be in direct competition with the interests of the attorney's client. The OBERON holding therefore puts the attorney in a potentially impossible situation.

In attempting to balance the interests of his own clients while simultaneously examining his client's motivation and "moral correctness," an attorney would come perilously close to running afoul of Disciplinary Rule 4-101, which requires the attorney to preserve his client's confidences and secrets, and Ethical Consideration 5-1, which requires an attorney to exercise his professional judgment within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. As the drafters of the Code noted, "neither his personal interests, the interests of other clients, nor the desires of a third person should be permitted to dilute his loyalty to his client."

The Florida Defense Bar Association believes that it would be difficult if not impossible for an attorney to act in compliance with the Code of Professional Responsibility, while simultaneously fulfilling the obligations to third parties which the Third District Court of Appeal has imposed through its decision in OBERON.

In that regard, there are numerous other possible areas of conflict which will confront an attorney who is attempting to satisfy the standards which the Third District has set in OBERON. Several of those possible conflicts will be considered later in this brief. However, it should also be pointed out that the Third District's decision in OBERON imposes a duty which is unprecedented in Florida, or elsewhere in this country.

The only Florida decisions which the Third District cited in support of its ruling in this matter are LORRAINE and McABEE, supra. Both of these cases involve an attorney's liability to the intended beneficiaries of a will negligently drafted by the attorney. As has been previously explained, the creation of such an exception to the privity requirement is well-founded in public policy. The OBERON court cited no Florida cases which support the extension of an attorney's liability to non-clients who are not the intended beneficiaries of the attorney's services.

The OBERON Court cited the decision of the California Supreme Court in BIAKANJA v. IRVING, 49 Cal.2d 647, 320 P.2d 16 (1958) in support of its decision. In reaching its decision in BIAKANJA, the Court identified a balancing test which it applied in creating an exception to the privity requirement

in will drafting cases. While California has since applied the balancing test to create other limited exceptions to the privity requirement, it has not moved as far from the privity requirement as has the Third District Court of Appeal. In fact, California still requires privity unless the plaintiff was an identifiable intended beneficiary of the attorney's services. See, e.g., HELD v. ARANT, 67 Cal. App.3d 748, 134 Cal.Rptr. 422 (2nd Dist. 1977); NATIONAL AUTOMOBILE AND CASUALTY INSURANCE COMPANY, v. ATKINS, 45 Cal. App.3d 562, 119 Cal. Rptr. 618 (2nd Dist. 1975).

The final case cited in OBERON was ALBRIGHT v. BURNS, 206 NJ.Super. 625, 503 A.2d 386 (App.Div. 1986). The ALBRIGHT decision is from a lower appellate court in New Jersey; it has not been cited as authority in any case other than OBERON. In fact, given New Jersy's adoption of privity requirements that are similar to those which prevail in Florida, it is respectfully submitted that the ALBRIGHT decision is little more than an aberration of New Jersy law. See generally, ACKERMAN v. LAGANO, 172 N.J. Super. 428, 412 A.2d 1054 (Super. Ct. 1979).

In addition, however, the ALBRIGHT decision is distinguishable from the facts established in OBERON, in that the ALBRIGHT court found that the attorney had performed acts which evidenced his acceptance of a professional engagement on behalf of the non-client's interests. No such intention to act on behalf of OBERON's interests was evidenced by the Angel firm. Accordingly, the Third District's reliance on the ALBRIGHT decision to support its departure from existing law was misplaced. However, while the OBERON decision

constitutes a departure from existing law in Florida, it also goes far beyond those limited exceptions to the privity requirement which have been acknowledged by the courts of other states.

Among those states that have moved away from a strict privity requirement in legal malpractice actions, two approaches have developed. California has enunciated the balancing approach which was utilized in BIAKANJA, supra. In determining whether a notary public who had drafted a will was liable to the decendent's intended beneficiary, the California Supreme Court held that the defendant's potential liability to a third person not in privity was a matter of policy, involving the balancing of various factors.

The factors to be balanced were identified as (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to him; (3) the degree of certainty that the plaintiff would suffer injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the "moral blame" attached to the defendant's conduct; and (6) the policy of preventing future harm. Applying this balancing test, the Court determined that a notary public who had prepared a will (although not authorized to practice law), and who had negligently failed to direct proper attestation was liable in tort to an intended beneficiary who was damaged because of the invalidity of the instrument.

The California Supreme Court applied the same principle in LUCAS v. HAMM, et al., 56 Cal.2d 583, 364 P.2d

685 (1961), cert. den. 368 U.S. 987, 7 LEd.2d 525, 82 S.Ct. 603 (1962) in addressing the liability of an attorney who was sued by the beneficiary of a will that had been negligently drafted. The Court in that case noted that it had to consider an additional factor which was not present in BIAKANJA, i.e., whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden upon the profession. Although liability could be large and unpredictable in some situations, the Court concluded that this may also be true of an attorney's liability to his client. The Court therefore determined that extension of the attorney's liability to intended beneficiaries who might be injured by a negligently drawn will would not place an undue burden on the profession, particularly given the fact that a contrary conclusion would cause innocent beneficiaries to bear the loss.

A different approach is exemplified by the decision in PELHAM v. GRIESHEIMER, 92 ILL.2d 13, 440 N.E.2d 96 (Ill. 2d Dist. 1982). Rather than requiring a balancing of various factors, the Illinois Court determined that the best approach is to require the plaintiffs to allege and prove facts demonstrating that they are in the nature of intended third party beneficiaries of the relationship between the client and the attorney in order to recover in tort. As the Court explained: "[B]y this we mean that to establish a duty owed by the defendant attorney to the non-client, the non-client must allege and prove that the intent of the client to benefit the non-client third party was the primary or direct purpose of the transaction or relationship."

In considering both the balancing test approach and the third party beneficiary approach, the PELHAM Court noted that it appeared that courts are more willing to apply the balancing test to extend an attorney's duty to non-clients in cases in which an attorney's representation of his client has essentially been non-adversarial in nature, such as situations involving the drafting of wills for the benefit of intended beneficiaries. However, where a client's interests are involved in a proceeding that is adversarial in nature, the existence of some independent duty on the part of the attorney to some third person would undoubtedly interfere with the undivided loyalty which the attorney owes to his client and might otherwise detract from the attorney's obligation to achieve the most advantageous position for his client. The Court therefore concluded that in order to create a duty on the part of the attorney to a non-client in cases of an adversarial nature, there must be a clear indication that the representation by the attorney was intended to directly benefit the third party.

In support of its refusal to extend an attorney's liability to non-clients in adversarial settings, the Court referred to the Illinois Code of Professional Responsibility, which not only requires that a lawyer represent his client with undivided fidelity, but also that a lawyer represent a client zealously within the boundaries of the law.

Various other policy reasons have been cited by other state court decisions which have refused to extend the liability of an attorney to non-clients. As the Court of

Appeal of North Carolina noted in CHICAGO TITLE INSURANCE v. HOLT, 36 NC.APP. 284, 244 SE.2d 177 (1978):

> Duties of the magnitude and seriousness involved when an attorney at law undertakes to represent a client should arise only from his contract of employment with his client, as governed by the law of contracts. See, 7 AmJur.2d Attorneys at Law, Section 167, page 146. To hold otherwise would encourage a party to contractual negotiations or other business matters to forego retaining counsel and later sue counsel representing the other contracting party for attorney malpractice, if the result of the negotiations should prove disfavorable in some way.

Applying this rationale, the Court refused to extend an attorney's liability to the vice-president or consultant of a corporate client.

Similar sentiments were echoed by the Court of Appeal of Arizona in CHALPIN v. BRENNEN, 114 Ariz. 124, 559 P.2d 680 (1977). There the Court noted:

> To impose upon counsel the responsibility of fully representing his client's interests in a contractual situation and at the same time making him liable to a third party to the transaction for fraud and misrepresentations under a malpractice theory we believe to be unreasonable and unwise. A holding to the contrary could conceivably encourage a party to contractual negotiations to forego personal legal representation and then sue counsel representing the other contracting party for legal malpractice if the resulting contract later proves disfavorable in some respect.

Applying this principle, the Court of Appeal rejected the plaintiff's contention that the defendant attorney owed the plaintiff any duty whatsoever with regard to the drafting of certain option contracts and employment agreements or the representations that were contained in those instruments.

Even California -- which has been a forerunner among the few states which have moved away from the privity requirement -- has refused to extend an attorney's liability to non-clients in adversarial situations or arms-length transactions. The plaintiffs in GOODMAN v. KENNEDY, 18 Cal.3rd 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976) sought damages from the defendant attorney for losses they incurred on certain shares of stock purchased from the attorney's clients, who were the principal officers of the corporation issuing the stock. The plaintiffs alleged that the defendant negligently advised his clients that the shares in question could be issued to them as stock dividends and sold to third persons without jeopardizing an exemption from certain registration requirements under the Securities Act of 1933. The plaintiffs also alleged that the defendant attorney had a telephone conversation concerning the proposed stock purchase with an attorney representing two of the three plaintiffs, in which the defendant attorney failed to advise the plaintiffs' attorney of certain facts which were allegedly material to the SEC exemption or the effect which the proposed purchase might have on its continued existence. As a result of the purchase, the SEC allegedly suspended the exemption, with a consequent loss in the value of the stock.

The GOODMAN Court concluded that the defendant attorney had no duty of care to the plaintiffs, in the absence of any showing that the legal advice was foreseeably transmitted to or relied upon by the plaintiffs, or that the plaintiffs were the intended beneficiaries of the transaction for which the attorney had been retained. The Court also found that

the defendant did not have any duty to bring up the subject matter of his prior advice to his clients during his alleged conversations with the plaintiffs' attorney.

In refusing to extend the attorney's liability to the purchasers, the Court in GOODMAN noted that a ruling against the defendant attorney would have injected undesirable self-protective reservations into the attorney's role as a counselor, i.e., if an attorney could be held liable to parties on the opposite side of an arms-length transaction for advice given in confidence to his own clients "The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal... would prevent him from devoting his entire energies to his client's interest." ANDERSON v. EATON, 211 Cal. 113, 116, 293 P. 788 (1930) The result would be both "an undue burden on the profession," LUCAS v. HAMM, 56 Cal.2d 583, 589 and a "diminution of the quality of the legal services received by the client."

Without going into a parade of "horribles," the Florida Defense Bar Association would respectfully submit that there are any number of problems which would be occasioned by the kind of rule that the Third District has announced in this matter. There is a virtually infinite range of transactions that may be handled by an attorney that would fall within the ambit of the Third District's decision.

For example, in virtually any situation in which an attorney is involved in negotiations, the attorney may learn of matters which might cause a change in position by the party on the other side of the same transaction were that

party to learn of this confidential information. In fact, it is safe to say that virtually every "deal" that is made using attorneys has two parties on either side of the transaction who believe that they got the better end of the deal.

The same thing can be said where cases are settled, i.e., parties often resolve litigation because of so-called "inside information" which makes it clear that a case should be resolved. Query: Can an attorney be liable to a non-client where that attorney has settled a case based upon his knowledge of anticipated testimony from a witness from whom he has taken a statement where the attorney learns that this particular witness has evidence that the attorney's client has committed perjury? Under the "moral guidelines" which the Third District established in this matter, that is more than a mere possibility.

The Third District's decision in OBERON essentially places an attorney in the position of having to render judgments as to the moral or ethical propriety of actions that are being taken by his client. Thus, the Third District has essentially set the attorney up in an adversarial role with his own client, i.e., the attorney must weigh the moral propriety of the actions of his own client against the possibility that the attorney himself may be sued by a party on the other side of that very transaction. That very prospect alone should be sufficient to cause this Court to overrule the Third District's decision in OBERON.

The difficulties inherent in the application of this kind of standard of care should be obvious even in this

instance, given the factual scenario of this very case. Towards the end of its decision in this matter, the Third District Court of Appeal noted that Defendant Angel might have a "duty to act in Oberon's best interest" if Mr. Angel "knew that Treister was a fiduciary for Oberon and knew of the potential conflict...." The Third District does not begin to suggest what it was that Mr. Angel would have been obligated to do under the circumstances, but the choices are rather obvious -- he could have either refused to handle the transaction for Mr. Treister, or he could have informed Oberon that Treister was the undisclosed principal in the transaction. Neither option is acceptable from either a public policy standpoint or given the current state of the law.

In the first place, restricting application of the Third District's "moral standards" to this particular case, it is clear that the Third District is compelling the Defendant attorneys to undertake an analysis that could never be completed in a satisfactory fashion. The Third District would have required Mr. Angel to determine whether Treister occupied a fiduciary relationship with Oberon. How is that to be accomplished? Was Mr. Angel required to put his client under oath, or was he simply to make discrete inquiries of Oberon, the party who was on the other side of the transaction which he had agreed to handle on behalf of his client? Further, how was Angel to determine whether the "potential conflict" which was discerned by the Third District was in fact a valid conflict of interest, or whether this apparent conflict might cause harm to Oberon, his client's former client?

The impossible nature of this task is only compounded

by the fact that there is no per se rule which prohibits an attorney from engaging in business dealings with a client or a former client. This was implicitly recognized by the Third District to the extent that it acknowledged that there was a "potential conflict between Oberon and Treister." Under the circumstances, the Third District has essentially set Mr. Angel up as judge and jury. Under the Third District's holding, Angel was required to take affirmative steps to determine whether the "potential conflict between his own client and another represented an actual conflict"; assuming the existence of an actual conflict of interest, he was then required to determine whether that conflict might cause damage to Oberon. The Florida Defense Bar Association would respectfully submit that the Third District's opinion to that effect has gone far beyond what can reasonably be expected of an attorney, in order to protect the interest of the public. Even using the Third District's own balancing test, the public's interest can surely be protected in a manner that will not otherwise jeopardize an attorney's ability to properly represent a client.

There are ample protections in place for individuals who are harmed by unlawful or unethical conduct by attorneys. In this very case, if Mr. Treister was guilty of unlawful or unethical conduct, he is subject to criminal sanctions and a greivance action by his own former client, Respondent Oberon. Similarly, Oberon may seek to recover civil damages from Mr. Treister to the extent that Treister allegedly violated his own ethical obligations in order to recover a profit at

the client's expense. And to the extent that a client secures a judgment against an attorney who is incapable of paying that judgment, the Florida Bar has established a fund to compensate the client. The Florida Defense Bar Association would respectfully submit that these remedies are more than adequate to serve the public's interest in those instances where an attorney violates his ethical obligations to his clients.

On the other hand, the results that will be achieved by the Third District's opinion are questionable, at best. Neither of the two options which were available to Mr. Angel would have prevented the harm that was allegedly occasioned in this instance. It is of course absurd to suggest that Mr. Treister could not have gotten another attorney had Mr. Angel refused to handle the transaction. It is equally absurd to suggest that a "duty to act" in this instance would have contemplated a disclosure by Angel of the identity of his undisclosed principal. Through that one act, Mr. Angel would have arguably violated a number of different ethical considerations and disciplinary rules, including rules that prohibit the unauthorized disclosure of information obtained in confidence from a client, see, e.g., EC4-1, EC4-4, EC4-5 and EC4-6; DR4-101(B), those which prohibit an attorney from representing the interests of multiple clients, see, e.g., EC5-1, EC5-2, EC5-14, EC5-15 and EC5-18, and those which prohibit an attorney from allowing a third person to influence his representation of client, see, e.g., DR5-107.

The Florida Defense Bar Association does not believe that an attorney can allow his judgment or his representation

to be influenced in any way, shape or form by considerations which involve a third person who the attorney is not representing, and who cannot otherwise be categorized as intended third party beneficiaries of the attorney's services. Any other rule of law would present an irreconcilable conflict with those legal, moral and ethical obligations that have been imposed upon attorneys through the development of the common law and the implementation of codified ethical standards.

Perhaps the most sacred of the Canons of Ethics which govern conduct by an attorney is Canon 7, which commands an attorney to zealously represent a client "within the bounds of the law." Nowhere within that canon of ethics does it suggest that an attorney is obligated to judge the morality of his client's conduct, and in fact such a rule of law would have a devastating impact upon the Bar of this state. It is interesting to note that an attorney is <u>not</u> prohibited from entering into business transactions with his own client; the rule simply enunciates standards that are to be followed by an attorney in determining for himself whether the existence of that business relationship may impair the attorney's ability to function in his role as counselor for the client. See, e.g., DR5-104 and EC5-2.

These rules of conduct are not in conflict, given the present state of the law. The Third District's decision in this matter will change all of that. For from this point on an attorney will not only have to be concerned with the ethical propriety of his own conduct, he will also have to be concerned about the morality of his client's conduct. While

there can be no question that an attorney must and should be concerned about avoiding any situations where he would be assisting in the perpetration of some kind of a fraud or illegal conduct, the present rules of law and the existing ethical code which governs attorneys in this state more than amply deal with that kind of situation. Under the circumstances, this Court should reverse the Third District's radical expansion of the liability of an attorney to non-clients.

CONCLUSION

For all the above reasons, the Florida Defense Bar Association would respectfully submit that this Court should enter an order quashing the Third District's decision below. This Court should issue an opinion which would make it clear that an attorney cannot be liable to a non-clients except in those limited situations where the attorney is retained to perform a service for a specific and identifiable intended beneficiary. An attorney should not be liable to non-clients who do not fall within that limited category, and this Court should therefore remand this case with directions to enter judgment for the Petitioner, pursuant to the summary judgment that was originally entered by the trial court in this matter.

Respectfully submitted,

BY: Debra J. Snow
ROBERT M. KLEIN
DEBRA J. SNOW

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 3rd day of March, 1987 to Shalle Stephen Fine, Esq., 46 S.W. 1st Street, Suite 201, Miami, Florida 33130 and Douglas H. Stein, Esq., Walton, Lantaff, Schroeder & Carson, 900 Alfred I. dupont Building, 169 East Flagler Street, Miami, Florida 33131

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