O/a 6-8-87

IN THE SUPREME COURT OF FLORIDA

IN RE PETITION TO AMEND RULES)
REGULATING THE FLORIDA)
BAR)

CASE 70,366

ANSWER BRIEF OF HENRY P. TRAWICK, JR.

Henry P. Trawick, Jr.
P.O. Box 4019
Sarasota, Florida 33578
813 366-0660

1 q 12

TABLE OF CONTENT

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

Respondent has no quarrel with the facts given in the statement of the case and facts by The Florida Bar. It merely recites what The Florida Bar has done through the special commission to study contingency fees and referral practices.

The statement of the case and facts is conspicuous because of the absence of any facts justifying what the Bar seeks to do in connection with the regulating of fees.

SUMMARY OF ARGUMENT

The limits on contingency fees does not give rise to a need to regulate referral fees. The proposed referral fee regulation will restrict the constitutional right of lawyers and clients to contract as they see fit within applicable principles of law. The requirement for disclosure will compound the evils of advertising and not ameliorate them.

RULE 4-1.5 OF THE RULES REGULATING THE FLORIDA BAR SHOULD BE AMENDED TO LIMIT THE AMOUNT OF THE REFERRAL FEE A LAWYER MAY COLLECT FOR REFERRING A CASE UNLESS THERE IS JUDICIAL APPROVAL OF A HIGHER FEE.

As said on page 5 of the Bar's brief this Court has already regulated the sharing of contingent fees between lawyers not in the same law firm. This regulation is reasonable and is sufficient. See In The Matter of The Florida Bar, 349 So2d 630 (Fla 1977).

The Bar then discusses the method by which the affected lawyers actually reach the agreement. Respondent submits that the method of reaching the agreement makes no difference so long as the procedure specified by the Court and now in force is followed. This procedure requires disclosure to the client, legal responsibility to the client for all of the services performed by any of the lawyers and the availability of each lawyer for consultation with the client. So long as the lawyers perform these duties, no just cause for complaint can arise.

Nevertheless, the Bar finds four objections that are listed beginning on page 6 of the Bar's brief.

There are only two parties in interest in any referral fee contract. They are the client and the other lawyer. So long as there is a disclosure to the client, legal responsibility by each lawyer to the client and availability for consultation, the client has no just complaint. So long as the two lawyers agree on the referral fee, neither of them can complain.

So where is the problem?

Is it because lawyers regularly refer all or a high percentage of their personal injury and wrongful death cases to other lawyers

even though they advertise to the public that they handle those cases? If so, the appropriate remedy is to police the advertising rules.

If it is because the lawyers agree on a referral fee of 50% and one of them does not actually take part in the case thereafter by agreement between the lawyers, what is the problem? Has this resulted in any loss or injury to clients? There are certainly no facts to substantiate any injury to the client. As a matter of fact, the report of the special commission on page 5 says:

> "Clients have been well-represented and well-served by having the ability to contract with lawyers under a contingent fee arrangement. They have also been well-served by lawyers dividing a particular fee..."

So, again, respondent asks, where is the problem?

Another point is raised that lawyers will seek a trial lawyer that will pay the highest referral fee. What is the evil in this that must be corrected? Respondent submits this is competition at its normal best. Is there some reason why a lawyer should be forbidden the right to take advantage of price competition? What is the danger or injury to the client? Under the regulations laid down by the Supreme Court of the United States, lawyers are suppose to be tradesmen huckstering their services in the market place. While many of us object to it, it is the law.

Finally, the complaint is made that some lawyers to whom personal injury matters are referred may reduce their fees to the client if there is no referral fee being paid to another lawyer. What is the injury to the public or to the client in this? Presumably the client has been told exactly what is going to be

done and has agreed to it. Does not the client have the right to contract as the client sees fit? The fact that a client occasionally gets a reduction in the fee because there is no referral certainly does not justify the imputation that a problem exists.

Finally, the procedure devised for obtaining an exception to the limitations proposed must have come from ALICE IN WONDERLAND. It assumes that the client and the lawyers are not competent to contract. It then places the burden on a circuit judge of deciding what the contract ought to be. A circuit judge may well have to decide what the contract is, but neither the client nor the lawyer should be deprived of the right to have a contractual dispute settled in a court of law with a jury trial if either of them want to do so. In short, approval of the contract should be judicially determined after the fact and under all of the circumstances of the case as the case unfolds rather than before the court can know what will be done by each lawyer or the client. Certainly, The Florida Bar is not entitled to participate in that determination and should not have any knowledge of the matter unless a person files a grievance against the lawyer or lawyers involved. What will Big Brother want to regulate next?

The proposed rule infringes the right of clients and lawyers to contract under the constitutions of Florida and of the United States and should be rejected on that basis alone. It is an attempt to regulate something that is working satisfactorily and does not need to be tinkered with. The Florida Bar should not be given the right to extend its sticky fingers into the attorney-client relationship in the matter of fees. The next proposal will

client relationship in the matter of fees. The next proposal will certainly be price control in all matters. Just because someone makes a proposal does not mean a problem exists or that a remedy is required.

RULE 4-7.3 SHOULD BE ADOPTED REQUIRING DISCLOSURE OF BACKGROUND INFORMATION.

This proposal is added to the proposal to limit referral fees and purports to apply only to lawyers who advertise. In that respect it is discrimination against personal injury lawyers.

Respondent has no objection to the proposal insofar as it applies to lawyers who advertise. That leaves it up to the lawyer to decide whether he will be governed by the rule by advertising or not advertising. Nevertheless, it is a bad precedent because the next move by the regulation minded Board of Governors will be to make it applicable to all lawyers. Respondent submits that the door should be kept firmly closed.

There is no factual basis given by the Bar for proposing the rule. There is no demonstrated need. There is no articulated problem from the public.

There are traditional ways of finding out about lawyers. Most of the clients apparently use those traditional ways.

The real problem is that this proposal compounds the advertising problem. Respondent readily confesses that he does not believe lawyers should advertise. The neon lights in Mexico advertising professional services should be enough to convince any person of the undesirability of making professionals into tradesmen. Nevertheless, under federal law advertising must now be permitted. There is no reason to extend it beyond what the federal law requires.

This proposal extends it. It not only permits, indeed, it commands a lawyer to tout himself to his client. This is the last thing the Bar should want or should propose.

RULE 4-1.5(c) SHOULD BE ADOPTED SPECIFYING THAT THE TIME AND RATE OF FEE SHALL NOT BE THE SOLE OR CONTROLLING FACTORS IN DECIDING WHAT A REASONABLE FEE IS.

This point has not been briefed or discussed by The Florida Bar. It should have been. Perhaps the reason it was not is because it cannot be justified.

Personal injury, collections, simple real property instruments, simple wills and some other legal services are charged for historically on an instrument basis or by a percentage. Many legal services and most of the work performed by respondent, perhaps as much as 85%, is charged on an hourly rate basis alone. This arrangement is perhaps the fairest fee arrangement between an attorney and a client. It is one that many clients insist on. While respondent no longer handles insurance defense work on a regular basis, insurance companies formerly required their retained attorneys to charge on an hour and rate basis. Respondent is informed that most of them still do.

Most clients want the lawyer to work on an hourly rate. It is to the client's advantage. The client can then know what he is being charged by simple multiplication.

Every client outside the real estate field of practice who asks respondent about fees wants to know the hourly rate and wants to be billed on an hourly rate alone. Virtually all corporations require it. Respondent has many clients ask that it be done in probating their estates or administering their trusts. They believe it is fairer than the percentage method used by banks.

Respondent has not seen any complaint nor any facts that would justify this new and revolutionary proposal.

Indeed, this Court recognized that time and rate are the two major foundation stones in setting fees in Florida Patient's Compensation Fund v Rowe, 472 So2d 1145 (Fla 1985). In Rowe the court gave trial courts authority to increase or decrease the fee based on results obtained and any contingency risk. The increase or decrease factors may be appropriate in litigation when the adverse party is being asked to bear the impact economically of the fee. Neither factor is necessary nor is either of them necessarily fair or appropriate when dealing with the direct attorney-client contract on fees. Neither is appropriate in nonlitigated matters unless the attorney and client have agreed to them.

This proposal says that an attorney and a client cannot agree on a time and rate fee. It would be an unconstitutional invasion of the rights of the parties to contract if this rule is adopted.

RULE 4-1.5(d) SHOULD BE ADOPTED TO SPECIFY WHAT FEE CONTRACTS BETWEEN LAWYERS AND CLIENTS WILL BE ENFORCEABLE.

This change was not briefed by The Florida Bar. It should have been.

In this proposal The Florida Bar moves from the area of ethical considerations into that of legalities. The Rules Regulating The Florida Bar should not form the basis for deciding contract cases. This is a matter for the courts to determine on a case by case basis. The Florida Bar has no legislative authority to say what contracts will be enforceable. With all respect, neither does this Court have that right, except on a case by case basis.

CONCLUSION

Respondent submits that the rules to which respondent has objected should not be adopted.

The undersigned certifies that a copy of the foregoing has been furnished to Joseph J. Reiter as President of The Florida Bar, Ray Ferrero, Jr., as President-elect of The Florida Bar, John F. Harkness, Jr. as Executive director of The Florida Bar, John Beranek, Robert P. Lipsky, Alex Lancaster, Marcia K. Cypen, Charles Stepter, Jr., C. Rufus Pennington, III, Karen Bokat, Arthur I. Jacobs, Thomas A. Pobjecky, Larry D. Beltz, Bill Wagner, W.C. Gentry, Michael M. Tobin and Evan I. Fetterman by mail on June 3, 1987.

Henry P. Trawick, Jr.
P.O. Box 4019
Sarasota, Florida 33578
813 366-0660