IN THE SUPREME COURT OF FLORIDA



IN RE: PETITION TO AMEND THE RULES

REGULATING THE FLORIDA BAR Case No. 70,366

# BRIEF OF THE FLORIDA BAR IN SUPPORT OF AMENDMENT TO RULE 4-1.5(a)-(c)

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## STATEMENT OF THE CASE AND FACTS

The committee to review DR 2-106 (now Rule 4-1.5 of the Rules of Professional Conduct) was created by the Board of Governors of The Florida Bar in September of 1986. The purpose of this committee was to review Disciplinary Rule 2-106 of the Code of Professional Responsibility due to confusion and conflicting interpretation of that rule in the determination of a reasonable attorney fee.

The committee met three times between October 3, 1986 and January 8, 1987. An oral report was given to the Board of Governors of The Florida Bar at its January 1987 meeting, together with proposed changes to Rule 4-1.5, Rules of Professional Conduct, for the Board's consideration. At its January 1987 meeting, the Board of Governors of The Florida Bar approved the proposed amendments to the rule as presented by the committee in order to implement the committee's recommendations.

The Board of Governors of The Florida Bar now seeks the approval of this Court for those changes in the Rules of Professional Conduct as set forth in the appendix to this brief.

## SUMMARY OF ARGUMENT

The Board of Governors of The Florida Bar is proposing amendments to Rule 4-1.5, Rules of Professional Conduct, in order to clarify the determination of a reasonable fee under that rule and also to clarify confusion that exists from recent caselaw interpreting the rule.

In Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), the Supreme Court of Florida adopted a formula interpreting Disciplinary Rule 2-106 of the Code of Professional Responsibility (now Rule 4-1.5) in order to determine a reasonable attorney fee award. While the opinion states that the court should use the criteria set forth in Disciplinary Rule 2-106(b) of the Code of Professional Responsibility, the analysis appears to disregard several of the factors and exalts number of hours spent in the legal matter over all others. In addition, the court indicates that a "contingency risk factor" and a "results obtained" factor may be used to add or subtract from a fee award, but then ultimately states that an adjustment can occur only if the fee is contingent or if there is a failure to prevail on a claim or claims.

The Florida Bar submits that this confusion can be resolved by amending the rule to emphasize the consideration of all factors in the determination of a reasonable fee in order to justify a fee which

may be higher or lower than that which would result from application of only the time and rate factors.

In addition, The Florida Bar submits that an amendment to the rule would be useful in order to clarify its applicability to all attorney fees.

## ARGUMENT

### POINT 1

IN DETERMINING A REASONABLE FEE, ALL OF THE FACTORS IN RULE 4-1.5, RULES OF PROFESSIONAL CONDUCT, MUST BE CONSIDERED AND WEIGHED EVENLY.

Many actions brought pursuant to the Florida Statutes provide for the award of reasonable attorney fees to the prevailing party in that action. Rule 4-1.5, Rules of Professional Conduct (formerly Disciplinary Rule 2-106 of the Code of Professional Responsibility), provides guidance to attorneys and the courts in the determination of a reasonable fee. It should be noted that that rule provides guidance not only to the court which must determine a reasonable fee in making an award to a prevailing party, but also guidance to the practitioner when entering a fee agreement with his client.

In Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) this Court was called upon to assist the trial court in the computation of a reasonable attorney fee to be awarded to the prevailing party in a medical malpractice action. In that case, this Court adopted the federal lodestar approach for computing reasonable attorney fees. In its decision, this Court indicated that the courts of this state should utilize the criteria set forth in Disciplinary

Rule 2-106 of The Florida Bar Code of Professional Responsibility. However, in arriving at the result, the Court appears to have placed greater weight on the amount of time expended in the litigation and the rate of fee that should be charged. While the Court does use or suggests that trial courts use all of the other factors to determine these two factors, they are not weighed equally in consideration.

The Florida Bar would submit that too much emphasis placed on hours expended could result in an unfair fee. More specifically, the less experienced attorney may take twice as much time to handle a matter as the experienced attorney and could be rewarded for his lack of experience and efficiency while the experienced attorney could be penalized for his diligence and efficiency.

While the Court talks about adding or subtracting from the fee based upon a contingent risk factor and the results obtained once the lodestar figure is calculated, it does not appear to apply in every type of case. More specifically, on page 1151 of the Rowe opinion, the Court states that:

> ". . . in computing an attorney fee, the trial judge should (1) determine the number of hours reasonably expended on the litigation; (2) determine the reasonable hourly rate for this type litigation; (3) multiply the results of (1) and (2); and, when appropriate, (4) adjust the fee on the basis of the

contingent nature of the litigation or the failure to prevail on a claim or claims."

This appears to imply that the lodestar calculated reasonable fee figure can only be adjusted if in fact the fee is a contingent one or if there is a failure to prevail on a claim or claims. Such factoring would appear not to take into account an extraordinarily good result achieved by an attorney or take into account the diligence and efficiency of an experienced attorney versus that of an inexperienced one.

The various district courts of appeal in this state have had some difficulty with this as well. In Lake Tippecanoe Owners Association, Inc. v. Hanauer, 494 So.2d 226 (Fla. 2 DCA 1986), the court reversed the trial judge in a condominium association case and held that the enhancement factor was not appropriate in this particular matter because an enhancement factor is only appropriate where a contingency risk multiplier is appropriate. The court stated that there was no contingency risk factor to be considered.

The Third District Court of Appeal has further clouded the issue in Margulies v. Margulies, 12 FLW 1153 (May 5, 1987) in which the court lowered an attorney fee in a divorce case. The court appears to imply that a more successful result may have motivated a fee enhancement, but this would not appear to be in accord with Rowe.

Proposed Rule 4-1.5(c) which reads:

> In determining a reasonable fee, the time devoted to the representation and customary rate of fees shall not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

would help to alleviate this confusion and this problem in that it would make it clear that in any case, whether the fee is fixed or contingent, enhancement or reduction may result after consideration of all of the factors listed Rule 4-1.5(b).

The Board of Governors has also proposed an amendment to Rule 4-1.5(b)(4) which would further assist in the recognition of whether or not enhancement or reduction is appropriate. That proposed section reads as follows:

> Significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representations , and the results obtained.

The additions proposed would allow not only for the consideration of enhancement where there was a great amount of money involved in the

litigation, but also where the subject matter of the representation takes on other significance besides monetary. The rule would also allow for a weighing of the responsibilities of attorneys involved in the matter when determining a reasonable fee.

The Board of Governors has proposed another amendment to one of the factors listed in Rule 4-1.5(b). Proposed Rule 4-1.5(b)(7) reads as follows:

> The experience, reputation, diligence and ability of the lawyer or lawyers performing this service and the skill, expertise or efficiency of effort reflected in the actual providing of such services.

This amendment would allow for a recognition of the abilities of the experienced attorney to resolve a legal matter in a shorter period of time due to the efficiency that he and his office may have developed during the course of the years of his experience. It could also serve to reward both the less experienced and more experienced attorney for their diligence in resolving a matter. Finally, the rule could also serve to justify reductions in the attorney fee if, in the opinion of the trial court, the case was not handled in an efficient manner due to lack of diligence, skill or expertise.

Another aspect of the Rowe decision which has caused some confusion among the district courts of appeal appears on page 1151 of the opinion wherein the Court states:

> Further, in no case should the court awarded fee exceed the fee agreement reached by the attorney and his client.

While that language is clear, the Third District Court of Appeal in Levy v. Levy, 483 So.2d 455 (Fla. 3 DCA 1986) held that in divorce cases, the statement just recited above in the Rowe decision was not applicable because fees in divorce cases are awarded typically because one party cannot afford to pay the fee as well as another and the liability of the paying party should not be limited to the exposure of the impecunious party. This theory was recognized by the Second District Court of Appeal in the case of Winterbotham v. Winterbotham, 500 So.2d 723 (Fla. 2 DCA 1987). In this case, the court held that the attorney fees awarded to the wife should not exceed her contractual liability, thus appearing to be in conformity with the Rowe decision. However, the court does state in dicta that it may have ruled differently if the wife had been in an inferior financial position resulting in an artificially low fee contract between her and her attorney. In addition, this court also states that it feels the enhancement factor reflected in the Rowe decision applies to fixed fee agreements as well.

The Board of Governors has proposed an amendment to resolve the problems stated above. Proposed rule 4-1.5(b)(8) reads as follows:

> Whether the fee is fixed or contingent, and if fixed as to the amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

This rule would allow a trial court to take into consideration an artifically low fixed fee agreement between attorney and client when making an award of attorney fees to that client in a matter in which that client prevailed. While the attorney may have agreed to a lesser rate of fee or a low fixed fee to handle the matter if his client lost, the attorney should not be penalized, if the client prevails, by strict adherence to the terms of that contract.

The Florida Bar submits that amendments to Rule 4-1.5(a)-(c) would greatly assist in resolving any confusing and difficulty caused by the Rowe decision and would assist both the courts and attorneys in arriving at a reasonable attorney fee.

## POINT 2

AGREEMENTS FOR ATTORNEY FEES BETWEEN ATTORNEY AND CLIENT SHOULD BE ENFORCEABLE UNLESS FOUND TO BE ILLEGAL, PROHIBITED OR CLEARLY EXCESSIVE.

It must be remembered that the Rowe decision dealt with court awarded fees under a particular statute. Any aspect of that decision should not be confused with or applied to agreements for fees between attorney and client. In other words, a court awarded fee which may be less than that agreed upon between attorney and client does not render that agreement necessarily null and void. Parties, after all, should have the right to enter into contracts without fear of those contracts being interfered with or impaired.

The Florida Bar's Board of Governors proposes an amendment to Rule 4-1.5 as follows:

> (b) Contracts or agreements for attorney fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreement, unless found to be illegal, prohibited by this rule or clearly excessive as defined by this rule.

This addition to the rule would make it clear to attorneys that there will ordinarily be freedom to contract with their clients without court interference. This freedom however is not absolute in that the contract would be unenforceable if it is illegal or if it is formulated in such a manner as to be in excess of a reasonable fee, clearly overreaching, unconscionable or entered through some means of intentional misrepresentation or fraud. In other words, the attorney and his client would be free to contract, but the attorney must always keep in mind the guidelines related to excessive fees and the guidelines related to fees in general as set forth in Rule 4-1.5, Rules of Professional Conduct.

The Board of Governors of The Florida Bar urges that the Court adopt such a rule so that attorneys and clients clearly understand their right to contract freely and the limitations that bind the attorney in entering such a contract.

## CONCLUSION

The Florida Bar Board of Governors respectfully requests that this Court adopt the proposed changes in the Rules of Professional Conduct attached to the petition and brief filed in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above brief has been furnished to the individuals listed below, by United States mail, this 4th day of June, 1987:

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