IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 73,638

UNICARE HEALTH FACILITIES, INC.,
d/b/a ARLINGTON MANOR CARE CENTER,

Petitioner,

vs.

EMMA M. MORT,

Respondent.

RESPONDENT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

STATUTES

SUMMARY OF ARGUMENT

This case is presently before the Court on petition for conflict certiorari on the grounds that the First District Court of Appeal's decision below in Mort v. Unicare Health Facilities, Inc., 537 So.2d 203 (Fla. 1st DCA 1989), expressly and directly conflicts with the decision of the Fifth District Court of Appeal in Ahmed v. Lane Pontiac-Buick, Inc., 527 So.2d 930 (Fla. 5th DCA 1988).[1] In Mort the court concluded that a plaintiff who accepts an offer of judgment which is silent as to attorney's fees is a "prevailing party" and may obtain statutory attorney's fees, if applicable, after entry of judgment. In Ahmed, the court concluded that an offer of judgment is tantamount to a settlement, and once an offer is accepted there is no prevailing party. Under Ahmed, statutory attorney's fees are not recoverable after acceptance of the offer unless expressly included within the offer.

The First District's decision in Mort should be approved by this Court as the law in Florida for the following reasons: (1) Mort is consistent, and Ahmed is inconsistent, with prior cases interpreting Rule 1.442 which have uniformly held that a party who obtains a Rule 1.442 judgment is a "prevailing party" entitled to statutory attorney's fees when the offer is silent as to such fees; (2) Mort is consistent, and Ahmed is inconsistent, with the definition of "prevailing party" which has been held to

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[1]The First District Court of Appeal's decision in Mort is contained at pages 1 through 3 of the appendix to Respondent's brief. The Fifth District Court of Appeal's decision in Ahmed is contained at pages 4 through 5 of the appendix.

mean the party who ultimately prevails when the matter is finally set to rest: (3) Ahmed is inconsistent with prior decisions of this Court which have held that attorney's fees can only be recovered after determination of the prevailing party and a motion for attorney's fees may be presented for the first time after judgment has been entered: (4) Mort is consistent, and Ahmed is inconsistent, with the principle, expressed by numerous Florida cases, that an offer of judgment is in the nature of a contract and the drafter of the offer of judgment must expressly include attorney's fees in the offer if the intent is to preclude the plaintiff from recovering attorney's fees after entry of judgment: and (5) Allowing an award of attorney's fees when the offer is silent on the issue is consistent with the purpose of Rule 1.442 which is to encourage a defendant to make an appropriate offer of judgment on a meritorious claim and stop the accrual of further costs and attorney's fees.

ARGUMENT

WHETHER THE FIFTH DISTRICT IN AHMED CORRECTLY HELD THAT A PLAINTIFF WHO ACCEPTS AN OFFER OF JUDGMENT CAN NEVER BE A "PREVAILING PARTY" BECAUSE ACCEPTANCE OF AN OFFER OF JUDGMENT IS TANTAMOUNT TO A SETTLEMENT, OR WHETHER THE FIRST DISTRICT IS CORRECT IN HOLDING THAT A PARTY WHO ACCEPTS *AN* OFFER OF JUDGMENT IS A "PREVAILING PARTY" ENTITLED TO STATUTORY ATTORNEY'S FEES IF THE OFFER OF JUDGMENT IS SILENT AS TO SUCH FEES *AND* ATTORNEY'S FEES ARE OTHERWISE RECOVERABLE IN THE ACTION

The Conflict Between Mort v. Unicare Health Facilities, Inc., and Ahmed v. Lane Pontiac-Buick

In Ahmed the Fifth District held that an offer of judgment under Rule 1.442, Florida Rules of Civil Procedure,[2] is tantamount to a settlement, and, therefore, when a plaintiff accepts an offer of judgment, and judgment is entered thereto,

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[2]Rule 1.442, Florida Rules of Civil Procedure, Provides in pertinent part as follows:

> At any time more than ten days before the trial begins a party defending against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or to the effect specified in his offer with costs then accrued. An offer of judgment shall not be filed unless accepted or until final judgment is rendered. If the adverse party serves written notice that the offer is accepted within ten days after service of it, either party may then file the offer and notice of acceptance with proof of service and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence of it is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer. . . .

the case is settled and there is no "prevailing party" for the purpose of statutory attorney's fees. In contrast, the First District in Mort held that there indeed can be a prevailing party upon acceptance of a Rule 1.442 offer of judgment, and a plaintiff who accepts such an offer may obtain post-judgment statutory attorney's fees if the offer is silent as to such fees. This Court is now called upon to resolve the conflict between the two decisions.

Mort is Consistent With Prior Florida Cases Which Have Uniformly Held That A Party Who Obtains A Rule 1.442 Judgment Is A "Prevailing Party" Entitled To Statutory Attorney's Fees When the Offer Is Silent As To Such Fees

The holding in Ahmed is contrary to prior Florida cases which have consistently held that a plaintiff who successfully obtains a judgment pursuant to a Rule 1.442 offer of judgment is a "prevailing party" for the purposes of recovering statutory attorney's fees and is entitled to recover such fees when the offer of judgement makes no mention of attorney's fees. In Wimbledon Townhouse Condominium Association v. Kessler, 425 So.2d 29 (Fla. 4th DCA 1982), the defendant made an offer of judgment to the plaintiff pursuant to Rule 1.442, Florida Rules of Civil Procedure. The offer of judgment made no mention of attorney's fees. The plaintiff rejected the offer of judgment, and final judgment was ultimately entered in the plaintiffs' favor at trial. In discussing whether the final award was more favorable than the defendant's offer of judgment, the appellate court found that the plaintiff would have been the "prevailing party" if it had accepted the offer of judgment, and therefore

plaintiff would have been entitled to pre-offer attorney's fees under Section 718.303(1), Florida Statutes, which provided for an award of attorney's fees to the "prevailing party." Id. at 31.

In Hernandez v. Travelers Insurance Company, 331 So.2d 329 (Fla. 3d DCA 1976), the defendant/insurer made an offer of judgment that included attorney's fees. The plaintiff/insured rejected the offer of judgment and later won a jury verdict at trial. In discussing the issue of whether the jury award was more favorable than the offer of judgment for purposes of "costs shifting," the appellate court stated that had the offer of judgment not included attorney's fees, then the trial court could have awarded statutory attorney's fees, in addition to the amount of the offer of judgment, for services performed up to the time of the offer of judgment.

In Parliament Insurance Company v. That Girl in Miami, Inc., 377 So.2d 1011 (Fla. 3d DCA 1979), the plaintiff/insured accepted the defendant/insurer's offer of judgment made pursuant to Rule 1.442, Florida Rules of Civil Procedure. The offer of judgment was silent as to attorney's fees. The plaintiff then sought and was awarded attorney's fees in addition to the amount of the offer of judgment pursuant to Section 627.428, Florida Statutes, which authorizes the award of attorney's fees to insureds who obtain judgments against their insurer. In affirming the award

of attorney's fees in addition to the offer of judgment, the appellate court held:

> The effect of the judgment was res judicata on the issues. If an insurance company wants to make an offer of settlement which includes attorney's fees, it should do so.

Id. at 1101. (Emphasis in original) (Citations omitted)

In Encompass, Inc. v. Alford, 444 So.2d 1085 (Fla. 1st DCA 1984), the First District Court of Appeal considered the issue of whether the party accepting an offer of judgment is entitled to statutory attorney's fees in addition to the amount offered, where the offer is silent as to attorney's fees. The offer of judgment tated that it included all accrued taxable costs, but it was silent as to attorney's fees. The First District Court of Appeal held as follows:

> We hold that unless the offer and acceptance affirmatively indicate that the amount specified in the offer is to include attorney's fees, the plaintiff. by accepting the offer, is not precluded from seeking attorney's fees to which he may be entitled by statute.

444 So.2d at 1086-1087. (Emphasis supplied) See River Road Construction Company V. Ring Power Corporation, 454 So.2d 38, 40-41 (Fla. 1st DCA 1984) (The court in dicta stated that where an offer of judgment fails to expressly include attorney's fees based upon statute, acceptance of the offer is not fatal to the plaintiff's subsequent claim for attorney's fees); See also McIntyre V. Lindsey, 488 So.2d 888, 889 (Fla. 1st DCA 1986) (If the offer of judgment had not included attorney's fees, then the plaintiff could have sought them pursuant to statute).

Finally, in Godbey v. Walsh, 530 So.2d 343 (Fla. 1st DCA 1988), the appellate court addressed the relationship between a Rule 1.442 judgment and a statute authorizing attorney's fees to a prevailing party. In Godbey the plaintiff accepted the defendant's offer of judgment which was silent as to attorney's fees, and, after entry of judgment, the plaintiff moved for statutory attorney's fees pursuant to Section 768.56, Florida Statutes (1983), the medical malpractice "prevailing party" attorney's fee provision. In affirming the trial court's award of attorney's fees, the appellate court concluded that "an offer of judgment means an offer for damages sought by the complaint and does not include costs or attorney fees unless specified." Id. at 344. The plaintiff, therefore, was not precluded from obtaining attorney's fees in addition to the judgment.

The Holding In Mort Is Consistent With The Definition Of "Prevailing Party"

The question of who is the "prevailing party" under the terms of former Section 768.56, the medical malpractice "prevailing party" attorney's fee statute, was addressed in Simmons v. Schimmel, 476 So.2d 1342 (Fla. 3d DCA 1985). In attempting to define the term "prevailing party," the appellate court looked to Black's Law Dictionary, which defined the term as: "The party ultimately prevailing when the matter is finally set at rest . . ." The appellate court then held that "the plain and ordinary meaning of 'prevailing party' requires that there be some end or finality to the litigation on the merits." 476 So.2d at 1344. However, the court also noted that a formal merits

determination is **not** necessary to support a fee award to the prevailing party under Section **768.56.** In the present case, Respondent is clearly the "prevailing party" entitled to attorney's fee as defined in Simmons v. Schimmel and the other cases discussed above. **See** Godbev v. Walsh, **530** So.2d **343, 344** (Fla. 1st DCA **1988).** In contrast to Ahmed, the First District's decision in Mort, as well as the decisions of the other district courts discussed above, is consistent with this definition of "prevailing party." A litigant who obtains a Rule **1.442** judgment ultimately prevails at the end of the case. Respondent sought monetary damages from Petitioner and successfully obtained a judgment against Petitioner for monetary damages. Respondent is, thus, the prevailing party.

Ahmed Is A Deviation From Prior Florida Case Law Including Case Law Of The Fifth District Court Of Appeal

Contrary to the decisions of the First, Third and Fourth Districts discussed above, in Ahmed the Fifth District held that a party who accepts an offer of judgment is not a prevailing party under any circumstances:

> When Ahmed's claims against Lane and Allstate were settled, there was no prevailing party. That is the purpose of a settlement -- to prevent the adverse party from prevailing.

Id. at **931.** In fact, the Fifth District's decision in Ahmed conflicts with its own prior decision in Georae v. Northcraft, **476** So.2d **758** (Fla. 5th DCA **1985),** wherein the court stated:

> We agree with our sister court's holding in River Road Construction Comlsanv v. Ring Power Corp., **454** So.2d **38** (Fla. 1st DCA **1984).** A party who accepts an offer of judgment may be

> a "prevailing party" pursuant to Rule 1.442, and entitled to recover attorney's fees accruing prior to the offer.

Id. at 758.

Even though the Fifth District's decision in Ahmed conflicted with its prior decision in Georse, the court in Ahmed not only failed to recognize or explain this conflict but actually relied upon George to support its decision. Such reliance was misplaced in light of the conclusions reached by the court in Georse. In Georse the defendants, who had been sued for breach of contract, made a Rule 1.442 offer of judgment which failed to specify any sum for attorney's fees. After specifically finding that a plaintiff who accepts an offer of judgment may be a "prevailing party" for the purposes of statutory attorney's fees, the Fifth District affirmed the trial court's denial of attorney's fees because the attorney's fees were pursuant to contract and, as such, were, in the court's opinion, unliquidated and an integral part of the damages stemming from the lawsuit.[3] In Georse, therefore, the court,

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[3]The court held that "an award of attorney's fees pursuant to a provision in a contract is encompassed in an offer of judgment made pursuant to Rule 1.442 which fails to mention them specifically or reserve a right to seek them later." Id. at 758. The appellate court found a substantive difference between attorney's fees awardable by contract and attorney's fees awardable pursuant to statute: the latter were, according to the court, "incidental" to the cause of action like costs, while the former were part of the damages and would naturally be included in the sum specified in the offer of judgment. The continued validity of the court's holding in Georse is questionable in light of this Court's subsequent ruling in Cheek v. McGowan Electric Supply Co., 511 So.2d 977, 979 (Fla. 1987)(The Court held that both statutory and contractual attorney's fees are not part of the substantive claim for damages and can be recovered

relying upon the decisions of River Road Construction Co. and Wimbledon Townhouse Condominium Association discussed above, found that a party who obtains a Rule 1.442 judgment may be a prevailing party entitled to statutory attorney's fees. In Ahmed, a case involving statutory attorney's fees, the court effectively receded from this position, and from prior Florida case law, in concluding that the party accepting the offer of judgment, silent as to attorney's fees, is not entitled to statutory attorney's fees because a Rule 1.442 judgment is in the nature of a settlement with no prevailing party.

The Ahmed Court Incorrectly Concluded That Because *An* Offer Of Judgment Is In The Nature Of A Contract A Party Is Precluded From Obtaining Attorney's Fees After Entry Of A Rule 1.442 Judgment When The Offer Is Silent As To Fees

The court in Ahmed concluded that an offer of judgment is in the nature of a contract:

> The crux of the matter is not the basis for the attorney fee claim, or a determination of the "prevailing party" but rather the organic right of parties to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise. No legislation or procedural rule can impair such a contract. U.S. Const., art. I, §10.

Id. at 931. The court's recognition that an offer of judgment is in the nature of a contract is consistent with the First District's decision in the court below as well as prior case law addressing Rule 1.442 offers of judgment. See BMW of North America. Inc. v. Krathen, 471 So.2d 585 (Fla. 4th DCA 1985) (The

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only after a determination of the prevailing party).

appellate court stated that "the construction of a Rule 1.442 judgment should be governed solely by the language employed by the parties if it is without ambiguity."); See also McIntyre v. Lindsey, 488 So.2d 889 (Fla. 1st DCA 1986).

The problem with the Ahmed decision is not that it analogizes offers of judgments to contracts, rather it is in the court's conclusion, from that premise, that a party who obtains a judgment pursuant to an offer of judgment cannot subsequently obtain attorney's fees pursuant to statute. A litigant's right to statutory attorney's fees, as well as the amount of such fee, is typically determined after entry of final judgment. It is only then that the litigant who has obtained the final judgment becomes a prevailing party. This is consistent with prior decisions of this Court holding that attorney's fees can be presented for the first time after final judgment has been entered:

> Therefore, we hold that proof of attorney's fees whether such fees are provided for by statute, see Finklestein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986), or by contract may be presented for the first time after final judgment pursuant to a motion for attorney's fees, as was done in this case. . . . In fact, an attorney's fee can only be recovered after the determination of the prevailing party has been made.

Cheek v. McGowan Electric Supply Co., 511 So.2d 977, 979 (Fla. 1987).

In the present case, Petitioner offered to have judgment entered against it for Forty Thousand Dollars ($40,000.00) plus

costs. Petitioner's offer was indeed in the nature of a contract, and the terms set forth in the contractual offer of judgment did not address attorney's fees. Once judgment was entered in favor of Respondent, Respondent was entitled to recover statutory attorney's fees since Respondent had obtained a judgment against Petitioner and was thus the prevailing party. The burden was on Petitioner, as the drafter of the contract (offer of judgment), to include Respondent's attorney's fees in the language of the offer if that was the intent of the offer. Petitioner's failure to do so does not preclude Respondent from seeking attorney's fees subsequent to entry of judgment.

Ahmed Is Not Based On The Fact That The Case Involved A Multicount Complaint

In deciding whether to approve of disapprove Ahmed, it is important to recognize that the decision in Ahmed is nct grounded on the fact that the case involved a multicount complaint only one count of which provided for attorney's fees. As quoted above, Ahmed held that "the crux of the matter" is not a "determination of the "prevailing party,' but rather "the organic right of parties to contract a settlement which by definition concludes all claims unless the contract of settlement specifies otherwise." Under the court's holding, therefore, even in litigation involving a single count, an offer of judgment that does not mention attorney's fees would preclude the party accepting the offer from obtaining statutory fees in addition to

the amount of the Rule 1.442 judgment.[4] As discussed above, this holding is contrary to every prior case that has addressed the issue, including the Fifth District's own decision in Georae v. Northcraft. In contrast, the holding of the First District in the opinion below is consistent with the prior case law. Ahmed should be rejected and this Court should resolve the conflict in favor of the First District's decision in Mort.

Since the Ahmed holding is not based upon the fact that the case involved a multicount complaint, it is questionable whether this Court should even address the "multicount complaint" argument raised by Petitioner: resolution of that issue is not necessary to a resolution of the conflict between Ahmed and Mort.[5] However, if the Court does decide to address this issue, it is clear that the First District was correct in finding that Respondent was a prevailing party under her multicount complaint. Respondent sought money damaaes in a complaint based upon a fracture Emma M. Mort sustained while a patient at Petitioner's nursing home and the concomitant failure of Petitioner to properly follow the Nursing Home Statute, Section 400.022,

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[4] It should be noted that the Fifth District in Ahmed certified conflict with Parliament Ins. Co. v. That Girl in Miami, Inc., 377 So.2d 1011 (Fla. 3d DCA 1970), a case presumably involving a single count complaint. Ahmed, 527 So.2d at 931 n.1.

[5] It is especially difficult to address this issue on conflict certiorari since the court's opinion in Ahmed does not specify the nature of the various counts in the complaint--with the exception of the count providing for statutory attorney's fees. It is impossible to tell, therefore, from a reading of the court's opinion whether the plaintiff in Ahmed could be construed as a "prevailing party" under the Mort court's analysis.

Florida Statute. The remedy and type of damages (money damages) sought were the same under all counts. Petitioner offered to have a money judgment entered against it on the complaint -- no distinction was made in the offer as to the counts set forth in the complaint.[6] By offering to have judgment entered against it, Petitioner, in effect, "acquiesced to the claims discovered during litigation to be meritorious." See Wisconsin Life Insurance Company v. Sills, 468 So.2d 920, 922 (Fla. 1st DCA 1979). As the First District explained in its decision below:

> While adhering to the legal analysis in Encompass we distinguish it (Encompass) from the instant case because it clearly contemplates a multi-count complaint which seeks different forms of relief while appellant's complaint sought money damages in each of its three counts and the offer of judgment resulted in a standard money judgment on all three counts.

Mort v. Unicare Health Facilities, Inc., 537 So.2d 203, 204 (Fla. 1st DCA 1989). The offer of judgment accepted by the plaintiff in Encompass, by its express terms, did not include an agreement for a judgment of foreclosure to be entered on the count of the complaint which sought foreclosure of the mechanic's lien. The drafter of the offer of judgment in Encompass agreed only to pay a money judgment, and there was no offer for entry of a final judgment of foreclosure. In contrast, in the case sub judice,

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[6]Under the language of Rule 1.442 Petitioner could have drafted its offer of judgment to exclude count 3, the count which provided a basis for statutory attorney's fees: "(A) party defending against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or to the effect specified in his offer . . . .(Emphasis supplied)

the resulting final judgment for money damages (the very remedy sought by all counts in the complaint) resulted in the Respondent becoming the prevailing party on its complaint, and, therefore, Respondent was entitled to attorney's fees pursuant to Section 400.023, Florida Statutes.

Allowing An Award Of Attorney's Fees When The Offer Of Judgment Is Silent On The Issue Is Consistent With The Purpose Of Rule 1.442

In Wisconsin Life Insurance Company V. Sills, 368 So.2d 920 (Fla. 1st DCA 1979), cert. dismissed, 373 So.2d 461, the First District Court of Appeal stated that the purpose of Rule 1.442 is to encourage a defendant to make an appropriate offer of judgment on a meritorious claim, which thereby stops the accrual of further costs and attorney's fees that could have been assessable against the defendant through trial. This is the defendant's incentive to make an offer of judgment. It is then the responsibility of the trial court to determine whether the plaintiff is entitled to pre-offer statutory attorney's fees and, if so, what a reasonable attorney's fee would be. By making an appropriate offer of judgment, Petitioner limited its liability to statutory attorney's fees that accrued up to the time of the making of the offer, as opposed to being liable for Respondent's attorney's fees through trial if Respondent prevailed at trial but did not obtain a monetary judgment in excess of $40,000.00.

Petitioner could have offered to settle Respondent's claims against it for $40,000.00 outside the mechanism of Rule 1.442, expressly stating that Petitioner would not pay an additional

amount for Respondent's attorney's fees. Instead, Petitioner decided to take advantage of the Rule 1.442 offer of judgment in an attempt to shift the cost of going forward to Respondent if Respondent did not obtain a more favorable judgment at trial. By taking advantage of the "cost shifting" provision under the rule, it is inconsistent for Petitioner to argue that attorney's fees are not recoverable when the offer of judgment is accepted, since the court, in determining whether the ultimate judgment was more favorable had the case gone to trial, would have been obligated to come to the opposite conclusion. See Hernandez v. Travelers Insurance Company, 331 So.2d 329 (Fla. 3d DCA 1976)(In discussing the issue of whether the jury award was more favorable than the offer of judgment for purposes of "costs shifting," the appellate court stated that had the offer of judgment **not** included attorney's fees, then the trial court could have awarded statutory attorney's fees, in addition to the amount of the offer of judgment, for services performed up to the time of the offer of judgment). Petitioner's simple remedy in utilizing Rule 1.442 was to include attorney's fees within its offer, or to exclude count 3 from the offer; if this was not a viable alternative under the particular circumstances of the case, then Petitioner should have foregone the use of Rule 1.442 and stayed within the traditional mechanism of a settlement offer outside the formal rules of civil procedure.

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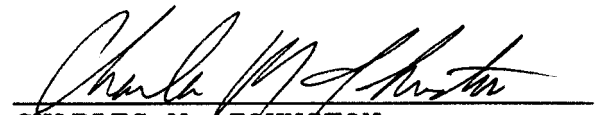
[7] Petitioner argues in its brief at page 9 that Respondent "had no reason to believe fees would be paid and in her acceptance of such offer she did not refer to payment of

CONCLUSION

Based upon the arguments and citations of authority set forth above, appellant requests this Court to approve the decision of the First District in Mort v. Unicare Health Facilities, Inc. and to disapprove the Fifth District's decision in Ahmed v. Lane Pontiac-Buick, Inc., and to remand this case to the trial court for assessment and award of attorney's fees.

TAYLOR, DAY & RIO



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attorney's fees." Petitioner's conclusion in this regard is incorrect. Based upon the long line of cases discussed above, Respondent had every reason to believe that an offer of judgment that fails to include attorney's fees does not preclude a litigant from obtaining statutory attorney's fees after acceptance of the offer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Nolan S. Winn, Esquire, Attorneys for Petitioner, 201 East Adams Street, Jacksonville, Florida 32202, by U.S. mail, this 27th day of March, 1989.

Attorney