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App

# SUPREME COURT OF FLORIDA



NO 74,538

In Re: Petition for Provision of Legal Aid to the Poor

PETITION TO AMEND THE RULE OF JUDICIAL ADMINISTRATION AND THE RULES REGULATING THE FLORIDA BAR

## MEMORANDUM IN OPPOSITION

Submitted by

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## ARGUMENT

## CONSTITUTIONAL CONSIDERATIONS

### "FUNDING" PROVISION UNCONSTITUTIONAL

The proposal provides in part:

> (d) THE PLAN
>
> The chief judge, after hearing or reviewing a recommendation from the commission, shall decide on a comprehensive plan to meet the legal need of the poor. Each plan WILL include the processes for FUNDING legal services, selecting meritorious cases; APPOINTING counsel, AND ENFORCING THE PLAN.

The judicial branch has no constitutional authority to make "provision for funding" a program. FLORIDA HAS CONSTITUTIONALY MANDATED SEPARATION OF POWERS. (Florida Constitution, Article 2, section 3) This proposal would usurp the power of the purse that the people have denied to any but elected members of their house of representatives.

### ENFORCEMENT PROVISION UNCONSTITUTIONAL

In MALLARD, v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA et al. 104 L.Ed.2d 318, 57 U.S.L.W. 4487 (May 1, 1989.) The United States Supreme Court said:

> An examination of state statutes governing in forma pauperis proceedings . . . bolsters this conclusion. By the late 19th century, at least 12 States had statutes permitting

courts to assign counsel to represent indigent litigants. None of those state statutes, however, provided that a court could merely request that an attorney serve without compensation... All of them provided instead that a court could assign or appoint counsel..... MOREOVER, THE EXTENT TO WHICH STATE STATUTES EMPOWERING COURTS TO "ASSIGN" OR "APPOINT" COUNSEL IN "IN FORMA PAUPERIS" PROCEEDINGS ALSO AUTHORIZED COURTS TO SANCTION ATTORNEYS WHO REFUSED TO SERVE WITHOUT COMPENSATION IS UNCLEAR, BECAUSE FEW APPOINTMENTS WERE MADE PURSUANT TO THOSE STATUTES, BECAUSE MANY LEGAL PROCEEDINGS WENT UNRECORDED, AND BECAUSE LAWYERS SEEM RARELY TO HAVE BALKED AT COURTS' ASSIGNMENTS. IT IS NEVERTHELESS SIGNIFICANT THAT NO REPORTED DECISION EXISTS IN THE ABOVE STATES PRIOR TO 1892 HOLDING THAT A LAWYER COULD NOT DECLINE REPRESENTATION WITHOUT COMPENSATION, SEE SHAPIRO, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U.L.Rev. 735, 749-762 (1980) (hereinafter Shapiro), for it suggests that Congress did not intend to replicate a system of coercive appointments when it enacted s 1915(d), particularly when it used the weaker verb "request" in place of the words "assign" or "appoint." ENGLISH PRECEDENTS FROM THE 15th to the late 19th CENTURY, on which the States apparently relied and which Congress might have had in mind, WERE EQUALLY MURKY. Few appointments were made in either civil or criminal cases; and ALTHOUGH SERGEANTS-AT-LAW WERE EXPECTED TO REPRESENT INDIGENT PERSONS UPON DEMAND OF THE COURT, THEY HELD PUBLIC OFFICE AND WERE COURT OFFICERS IN A MUCH FULLER SENSE than advocates who appeared before it. AGAIN, NO REPORTED DECISIONS INVOLVE THE IMPOSITION OF SANCTIONS ON LAWYERS UNWILLING TO SERVE. See id., at 740-749. Professor Shapiro concludes: "TO JUSTIFY COERCED, UNCOMPENSATED LEGAL SERVICES ON THE BASIS OF A FIRM TRADITION IN ENGLAND AND THE UNITED STATES IS TO READ INTO THAT TRADITION A STORY THAT IS NOT THERE." Id., at 753. (FN4)

FN4. IN CLAIMING THAT "STATE COURTS HAD STATUTORY AUTHORITY TO ORDER LAWYERS TO RENDER ASSISTANCE TO INDIGENT CIVIL LITIGANTS IN A DOZEN STATES" IN 1892, POST, AT 1825, THE DISSENT IGNORES RECENT SCHOLARSHIP QUESTIONING THE EXTENT OF THAT AUTHORITY AND CASTING DOUBT ON UNQUALIFIED AND POORLY DOCUMENTED ASSERTIONS OF ITS EXISTENCE by

> contemporary writers, such as Cooley. See Shapiro 751-753. In view of the COMPLETE ABSENCE OF PRECEDENT EVINCING STATE COURTS' POWER TO SANCTION ATTORNEYS unwilling to provide free representation, the dissent's surmise that Congress meant to grant this power to federal judges, and indeed to confer on them as much authority as judges in the "most progressive" States exercised, post, at 1825, seems somewhat extravagant.

The plan contains no details, no limits, no standards, no procedures, and does NOT REQUIRE THAT ONLY ELECTED JUDICIAL OFFICERS EXECUTE IT. In MALLARD, supra, a VOLUNTARY plan was DELEGATED BY THE LOCAL JUDGES TO THE LEGAL SERVICE PROGRAM, which attempted to use the authority of the court to compel BY SANCTIONS (under a VOLUNTARY SERVICE STATUTE) a new lawyer, specialized in wholly unrelated fields, to PROSECUTE a 1983 case (about which he knew nothing, AT PERIL OF MALPRACTICE) against people he did not want to sue. (violating his freedom of conscience). The proposal asks the Court to now mandate a plan that will force overworked trial judges to likewise abdicate exclusive judicial authority over the bar entrusted to them by the people, which may not be lawfully delegated. (Delegatus non potest delegari). Already, In proper cases, judges do make appointments. The lawyers are appropriately selected, and willing. To the extent feasible under inherent power limits, the practice already exists. The plan adds nothing positive. It does contain an implicit accusation of indifference or sloth directed against local circuit judges that is unwarranted AND untrue. There are further considerations in mandatory CIVIL pro bono. In criminal matters the state is a party. (Not so in civil cases.) Punishment to vindicate public order rather than money damages

is involved. (Not so in most civil cases). The indigent is always a Defendant. (Not so in civil cases). If a criminal cannot use free counsel as a sword rather than a shield (SEE MURRAY V. GIARRATANO 106 L.Ed.2d 1, 57 U.S.L.W. 4889, June 23, 1989 ), should a CIVIL PLAINTIFF be allowed to? Is not a free lawyer in the hands of a plaintiff seeking a money judgment just that? May not a defendant, gifted with a free lawyer, demand such a defense as to forge his shield into a sword as well? What overiding interest of the state justifies picking a stranger's pocket to solve a private dispute over money? That he is a lawyer? Then shall "right to access" plunder a Doctor (expert witnesses are often essential to a litigation), a realtor (essential to real estate discrimination cases), any licensed professional, any licensed technician, any licensed trade? All exercise a "privilege" in earning their livelihood. The claim that a lawyer on coming to the bar surrendered his entire property (for such is the hazard of malpractice litigation), rights of freedom of association, expression, and personal liberty into the hands of undefined and unrestrained private persons at the pleasure of a local judge without hearing or a fig leaf of due process has, as the United States Supreme Court observes, no constitutional or case law precedent. It has less justice, and no sound logic. Such an intrusion requires more that the naked assertion that it is the "traditional obligation of a privilege", which as the U.S. Supreme court has observed, it not the case in any event. Doubtless this is why the petition relied on 15th century precedents of an absolute monarch much admired by George III, whose disdain for the rights of men

raised up a shout of denial in the Virginia House of Burgesses that rings yet in the hearts of all those who honor fundamental law.

## THE PETITION IS UNWISE

One of the fundamental precepts of constitutional law, is that the enumeration of LIMITS on governmental action in the bill of rights is NOT A GRANT OF POWER TO GOVERNMENT.
(Hamilton-Federalist Papers number 84, U.S. CONSTITUTION, AMENDMENT XI, Florida Constitution, Article 1, section 1).
In CRIMINAL trials there is a RIGHT TO COUNSEL. In CIVIL matters, ARTICLE I SECTION 21 IS SILENT ON THE RIGHT TO COUNSEL. It requires only that courts be open and justice not be denied, sold or delayed. There is a difference between a RIGHT to litigate over money, and an OPPORTUNITY to do so, AT ONE'S OWN EXPENSE. Some contend lawyers fees DENY access, and even a widow's mite should be protected. But economics can have that effect on anyone. The "tax man" CAN be called to account before a jury. All one must do is find the money to pay the exaction first, hire the lawyer, assume the burden of proof, and litigate against the full resources of the United States in its own courts. But few can. Patents and copyrights can be protected, but only by the most powerful of corporations. When a young system analysist's programs, painfully crafted over years, are appropriated by a corporate multinational, his loss is real, and his recourse illusory. When family businesses built by decades of labor are appropriated without fair compensation, leaving no money to litigate against the influential and powerful, is not both the loss and the denial real? Justice involves balancing

what is right and what is feasible in an imperfect world that knows no justice save that which men of conscience and wisdom create. Given the INHERENT LIMITATIONS upon a judicial system it cannot "cure" everything for all men. Economics ARE a screening device, responsive to facts AND justice, automatic, impartial, and flexible. (The development of the contingent fee system is an example of the response of a free society to "unmet legal needs", as are group legal service plans, and a variety of other responses by our system too numerous to outline.) While the potential for isolated miscarriage exists, neither the court, nor the bar, nor the churches nor government funded entities who have expended billions over decades, nor individual lawyers who have served without compulsion or recognition far longer, are unavailable in extreme cases. Balanced against the impact upon a system of limited resources of a proposal that FOSTERS litigation over small sums, or for spite, vindication, satisfaction, or through other human emotion untempered by cold economics, such limitations are the least of evils. You cannot insure that courts are open and justice speedy if a already burdened system is subjected to unrestrained litigation. Others are entitled to THEIR day in court too. There is more than one way to close courts and deny justice by delay, and this proposal is a prime candidate. It is not a proposal for Pro Bono nearly as much Prime Boondogle at the instance of the same "concerned people" who gave us the abuses cited by the Reader's digest in the article attached in the appendix that have already so burdened our system. For an outline of the full potential this proposal would invoke, the court is respectfully referred to the

exhaustive compilation from the Legal Services's own internal documentation by Senator Hatch's oversight committee, published by the Washington Legal Foundation,"The Robber Barons of the Poor". That this program would be dominated by such is certain. SUCH WAS THE CASE ALREADY in BALLARD. Mere judicial circuits, without power to tax, and already overtaxed, could not resist the combined pressures to surrender day to day control to these agencies that this proposal would impose. If this court is to embark upon compulsion on pain of sanction, it cannot shirk the duty to itself plot the course and box the compass of what it commands. Are domestic cases (the bulk of legal aid and often like elective surgery) included? Must forced representation be defensive only, or may lawyers be compelled to sue, and if so when and under what circumstances? Will the lawyer be compelled to institute a legal malpractice case? Sue the sheriff who serves his papers, or the clerk who files them? What of a medical malpractice case? A client he might otherwise acquire? Someone whose will he holds for safekeeping? Will the "free" lawyer be entitled to recover a fee, if the adverse party can pay and the law otherwise provides for it? (In pro bono cases, circuit judges nonetheless deny any such fee in many counties). When will the duty cease? (recurrent calls years later are not infrequent in domestic and tax matters). Are enforcement, modification, or appeal proceedings contemplated? Are consumer cases included? Such are often over money, and a reaction to consequences that were avoidable. What safeguards shall prevent a "free lawyer" in such disputes, through his mere availability from becoming an instrument of legalized extortion? (The

defendant will not qualify for a free lawyer.) Shall the program be limited only to matters before the courts, or shall it include administrative problems, problems in other courts (Bankruptcy, Social Security, Tax Court, etc. Will it include Federal actions? - Much public housing is subsidized). If so, by what authority? What provisions will be made regarding the Rule 11 sanctions, (or FS 57.105) where attorneys are conscripted into areas outside their experience? Will it include actions against government agencies, or against the armed forces (many attorneys are reserve officers) or churches? Will the attorney be immune to malpractice actions, when forced to accept representation against his will? Will the attorney be immune to grievance procedure under similar circumstances? (The likelihood of prospective clients adopting such tactics when frustrated in efforts to twist litigation into spite or malice suits are also a screening restraint exercised by counsel within the present system which often avoid a double burden upon it. This restraint will also be removed. ) How will the court deal with the temptation to judges, who are politicians, not to give burdensome tasks to the rich, powerful, and prominent? In the absence of some provision, (and likely despite it) the political realities are that the sole practitioner, the small firm, the young, poor, or elderly members of the bar will bear the brunt of the burden. Many of them may be as legitimate an object of legal aid as those they are compelled to represent for free. (I once had a domestic legal aid case where the plaintiff in fact had through a boy friend more assets available than I did, and drove to court in a car I could never hope to own. Yet I was

called on to work for her gratis.) When confronted with such abuses, what provisions will be made to control and redress the predictable frauds upon the system, and its exposed participants? Will attorneys have charging liens, when it appears that the clients in fact DID have assets, or goods are replevied, or marital property obtained, or a will contest sustained? Will the legal service lawyers also be subject to Court assignments? Will state's attorneys and public defenders be? Attorneys on staff with the Attorney General, the DOT, the Department of Education? Will the judiciary discharge their obligation by dedicating their Saturday or other free time to the administration of the system gratis? What of out of state lawyers admitted in Florida? What of the specialist in Bankruptcy who does not practice in state courts? To say that a score of "committees" will solve all this on a circuit by circuit basis is inconsistent with the assertion of inherent judicial authority. The results will not be logical, and consistent from circuit to circuit. If a system is to be created by the court's authority, it should be created by the court, administered by the court, lead by the court through example as well as command, and affect all those who are conscripted to its service fairly, equally, and uniformly throughout the state. Provision should be made by THE COURT to avoid access to the system by those who should not have it, by THE COURT to prevent its use as a political instrument or instrument of profit, by THE COURT to identify the broad types of cases which are not a legitimate subject of legal aid, evaluate and redress abuses, and identify and discontinue practices that are ineffective or

harmful. Any other course is not a exercise of power, it is a constitutionaly impermissible abdication of it. In the end at best we will have only formalized at great effort, what already exists. At worst, the harm through unfulfilled and unfulfillable expectations will take decades to repair.

## THE PETITION IS UNCONSCIONABLE

During the Reagan Administration, the Legal Service retrenched actions against school systems until a more favorable day. Now the political climate has changed. Now mandatory IOTA has funneled to those same entities money which they contend are not burdened with Federal restrictions placed upon the uses to which legal aid funds may be put. Now the professional legal aid establishment has assigned assaults on the school systems, local and state, a vastly enhanced priority, and allocation of resources. Thus an "unmet need" in traditional legal aid has been created, and lawyers are now again to be forced into unwilling collaboration in facilitating a course of conduct which many of them detest as a twisting and distortion to partisan political purpose of justice itself. Who is acting now and why is evident. That the plan is a mere coincidence at this time and under these circumstances strains belief. Ranged against it are the beliefs of the rank and file of this courts loyal officers. We believe that test cases against defendants who want to lose to create judicial precedent for intrusions that were never intended or adopted by elected legislators is both an abuse of the judicial system and an assault on democracy. We believe that test cases to create an agnostic state rather than a non-sectarian one distort organic law

intended to secure freedom of open and public religious expression rather than silence it. We believe that attempts by test cases to alter commercial law, landlord tenant law, inheritance, dower, property law, or indeed ANY law for the purpose of granting special favor to an economic class is divisive, socially undesirable, and a violation of the tradition that justice is no respecter of the station of persons, rich OR poor. We believe that "class struggle" by ANY means, including judicial, has no right to compel our service, our thoughts, our words, or our skills, to achieve the day when the goddess of justice is replaced by Robbin Hood, or" equal justice under law" on her portals scrawled over with with the false shibboleth of "income transfer". We believe that a "legal aid" system that takes public money intended for legal aid to individuals, to advance its "social agenda" by lobbying our legislature, or our courts, or building voting blocks with those funds, or for propaganda in a Bar News that will not even print a paid add in opposition has no claim upon our service to assume the thankless task it abandoned to contend for its distorted version of "social justice". Our justice is the justice of facts, under a law made by elected representatives, a law of individuals interacting freely in a free society under the common law of proud, equal men fashioned case by case on what is just between them, not a slavish service of an ill defined "greater good for a greater number". It was that fundamental law we swore to uphold. We are faithful to that oath, and it constrains us to say that to contort a power of discipline fashioned to preserve freedom's law to violate its most fundamental nature and

precepts is neither "proud" nor "traditional." It is the last step in the destruction of the efforts of local lawyers toward "traditional" legal aid focused on individuals within a system calculated to guard the dignity and save the pride of every man.

## CONCLUSION

Proponents of this new order hail a "wave of enlightened justice" but it is a DARKENING WAVE THAT SWEEPS MEN AGAINST CONSCIENCE AND CONVICTION IN FORCED OBEDIENCE to the will a vocal, unelected minority,. Thomas Jefferson said it best:

**TO COMPEL A MAN TO FURNISH CONTRIBUTIONS FOR PROPAGATION OF OPINIONS IN WHICH HE DISBELIEVES AND WHICH HE ABHORS IS SINFUL AND TYRANNICAL**

God save this honorable court, and us all, from such a "plan

Respectfully Submitted

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above document has been furnished to Talbot D'Alemberte, P.O. Box 20289, Tallahassee, Fl 32316, and John Harkness, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl 32399-2300 by regular U.S. Mail this 14th day of November, 1989.

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# A P P E N D I X