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IN THE SUPREME COURT OF FLORIDA

IN RE: PETITION FOR PROVISION OF LEGAL AID TO THE POOR.

CASE 74,538

RESPONSE OF HENRY P. TRAWICK, JR.

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Respondent Henry P. Trawick, Jr. is a member of The Florida Bar and responds to the petition in this proceeding:

JURISDICTION

The petition says that jurisdiction is derived from Rule 1-12 of the Rules Regulating The Florida Bar and Rule 2.130(b). Jurisdiction for this Court cannot be derived from a rule. It must be found in the Constitution. Respondents submits that the petition is fatally defective because this Court lacks jurisdiction.

SUMMARY

Respondent accepts petitioners' summary insofar as what petitioners seek. Respondent does not agree that this Court has accepted responsibility to make legal services fully available or that it has such a responsibility. Respondent denies that The Florida Bar has such a responsibility or that it has made efforts to accomplish that. Respondent denies the balance of the summary.

THE LEGAL BASIS FOR THE PROPOSED RULE

The legal basis for the proposed rule as asserted by petitioners is captious. It depends on dicta in the Furman case, cited by petitioners, and then proceeds from an unproven and false premise that this court has a duty to provide legal services to the poor (a socio-political decision that certainly should be made by the legislature) to assert that the common law of England, as adopted in Florida, requires this Court to violate the constitutional separation of powers doctrine and to extend the ethical duty of lawyers beyond courts and clients to a segment of society designated as "the poor." Presumably, this is necessary because petitioners have decided, in a total vacuum insofar as proof is concerned, that the so-called poor are in need of this radical change of a lawyers ethical obligations.

What petitioners are seeking has nothing to do with the historical duty to provide counsel in criminal cases. This function has properly been assumed by the State in the adoption and implementation of the public defender system at the expense of all of the citizens and taxpayers. This section of the petition is riddled with patent errors and unproved assertions. For example, some legal rights are effectively implemented by title insurance companies, real estate brokers, architects, the Department of Health and Rehabilitative Services, court clerks and trust companies. The demarcation line between the practice of law by layman and lawyers is blurred and is becoming more so with the passage of time. As examples, see The Florida Bar v McPhee, 195 So2d 552 (1967);

Cooperman v West Coast Title Company, 75 So2d 818 (1954); Oakland Consolidated Corporation v Southern States Land Company, 234 So2d 384 (1970) and Rule 7.050(c). Sometimes the result of laymen practicing law in the fields authorized by this court do not produce happy results. That can also be said in some cases when the lawyers are performing the work. Certainly, it does not take a lawyer to determine whether a deed complies with the statutory requisites of execution insofar as witnesses and acknowledgment are concerned. In the technical sense a layman who said that it did comply is giving a legal opinion, but is he guilty of the unauthorized practice of law? Respondent doubts whether this court would ever take action on such a complaint. Many of the everyday facts of life that are conclusions of law are also such that layman can pass judgment on the conclusion of law without the intervention of a lawyer. Some examples are assertions by a person that he is a partner, a joint venturer or the owner of land. So the conclusion that a lawyer is required is debatable. It depends upon the circumstances.

Most of the basis asserted by petitioners for this Court's responsibility in providing legal aid to the poor in civil cases is based on The Florida Bar v Furman, 376 So2d 378 (1979). So far as we know from the opinion, the case did not deal with an indigent or the so-called poor. It dealt with the owner of a secretarial service who was giving legal advice about divorce. Certainly, her customers were paying her. Almost as certainly, they were not paying as much as a lawyer would have charged. As a result of the Furman case this Court authorized the parties themselves to obtain divorces by

Rule 1.611 and authorized the clerk to help the parties even when the clerk is not a lawyer. In passing, respondent notes that he opposed this rule and that some of the problems foreseen by respondent have come to pass in its implementation. Be that as it may, the Furman case is not authority for any proposition except that Rosemary Furman was guilty of the unauthorized practice of law. Whether she served the rich or poor is not disclosed in the opinion.

On page 5 of the petition it is asserted there is no evidence that lawyers are overburdened with public service or that some requirement of public service would be unduly burdensome. Neither is there any evidence to the contrary. But neither point is the question at issue in this petition. The question at issue is whether this Court has the authority to force lawyers to perform so-called pro bono work as directed by a circuit judge.

What petitioners fail to recognize is that some lawyers perform their public service in arenas other than representing the so-called poor. Some of them work without compensation for churches, medical foundations, schools, civic organizations, the legislature, this Court and The Florida Bar. Respondent believes that he is constitutionally entitled to perform his charity as he sees fit and not as this Court, a circuit judge or petitioners deem appropriate. Respondent believes that he has the right to differ with any and all of them and to exercise that difference without restraint.

Justice Overton's statements in the D.B. case, cited by petitioners, is unsupported by legal authority outside criminal

practice. At common law in England there was no such obligation. Initially, the right to be represented by counsel was a privilege granted by the Crown to those who were willing to pay for it. There is a good reason for this. The State is prosecuting the accused. The State has an obligation to see that the accused can defend himself. This has been done in Florida by the public defender system. In a civil case the plaintiff is not obligated to sue. The defendant is not required to defend. He may let the matter go by default. Such elections are not available in criminal procedure.

Petitioners' reliance on the statute of Henry VII as being a part of the common law of Florida is based on bootstrap scholarship. They say it was imported into Florida law by Section 2.01 Florida Statutes and by Thompson's Digest and the article entitled "Useful and Helpful Matter" in Florida Statutes 1941.

First, respondent recognizes the scholarship, diligence and authority of Judge Thompson. He also knows of the limitations of the statute under which Judge Thompson worked. The statute authorized a digest, not a compilation. The commissioners who reported to Governor Moseley on the digest and recommended its approval clearly point this out. The Digest itself contained what is now Section 2.01 Florida Statutes and also specifies the scope of the digest insofar as English statutes are concerned. It says:

> "To said Digest shall be attached an Appendix, which shall contain the Constitution of the United States, and the State of Florida; the Statutes of Frauds and Perjuries passed in the twenty ninth year of the reign of Charles II.; also all English acts relating to Habeas Corpus(s)"

After according Judge Thompson all of the credit that his

scholarship is due, Florida did not adopt the Statute of Henry VII by Thompson's Digest. The language on page 13 concerning the acceptance of the Statute of Henry VII as still being in force is simply untrue. Volume III of Florida Statutes merely lists what Judge Thompson had compiled nearly 100 years before. A distinguished Florida lawyer, Guy W. Botts, was asked in 1941 by then Attorney General Tom Watson to bring Judge Thompson's compilation of English statutes to date. He did so. I am sure that both Mr. Botts and General Watson would be amazed to find someone contending that they could enact legislation for Florida or determine definitively that an English statute is in force in Florida. In his foreword Mr. Botts mentions some of the problems in the revision. It is interesting to note that he says close questions are resolved in favor of considering the statute still in force. Be that as it may, certainly the inclusion of an appendix of helpful matter in Florida Statutes (a practice that has unfortunately fallen out of favor recently) is not a basis for saying that the statute is in force in the light of the constitutional provisions mentioned subsequently in this response.

Respondent agrees with Mr. Joseph W. Little in his response that Article I, Section 21 of the Florida Constitution does not bear on the issue. The provision means precisely what it says--nothing more. It is a prohibition against the exaction of money by the government and does not deal with the appropriation of funds to pay for legal services of the so-called poor. Respondent finds it fascinating that petitioners have developed an inherent power of

the court doctrine. It has always been respondent's belief that power was inherent in the people, not the government or any part of it. If there is a valid doctrine of inherent judicial power, it has to be confined to the courtroom. It cannot be expanded to social welfare. Otherwise, this Court could legislate the fees of clerks insofar as the judicial process is concerned, the fees of lawyers in litigation, the salary of the judiciary, the building of courthouses and furnishing of courtrooms, among other things. If the courts can do this there is no limit to their power and authority. The financial checks and balances of the constitutions do not exist. Respondent wonders why lawyers seek to open doors to absolutism in the name of some pet project. This petition is one of a long line of projects purportedly to improve the reputation of the Bar among the members of the public by pandering to the press and hoping for favorable publicity. They mistake their target. The Bar is sworn to keep secrets. The press diligently attempts to reveal them. There is a conflict that cannot be resolved so petitioners' hopes in the public relations field are doomed to disappointment.

It is clear that the petition seeks to avoid this Court's decision in the Emergency Delivery of Legal Services to the Poor case, cited by petitioners. In an ordinary proceeding petitioners might face a contempt citation for this petition since the matter has already been decided once by this Court. While they say they are not attempting to subvert the decision in that case, it is clear from the footnotes, as well as the concepts asserted, that such is

not the case. The petition is a sham.

Perhaps petitioners have been encouraged by this Court's reconsideration of IOTA.

One of the fundamental differences between English and Florida law is the existence of two constitutions. Both prohibit the taking of property without just compensation and due process of law. Both grant lawyers, among others, the right to differ from petitioners in socio-political matters, morality issues and philosophy. Because Parliament was able to oppress the colonies, the late unpleasantness between the United States and Great Britain occurred. A number of the provisions in the federal constitution are there because of parliamentary and royal oppression. Petitioners are asking this Court to ignore the lessons of history and to take property from lawyers for the benefit of private persons without compensation, require lawyers, including respondent, to comply with what petitioners conceive to be a moral duty and to violate respondent's right to contribute to charity as he deems appropriate. They do this after they, among others, have succeeded in convincing this Court to amass a fortune annually for the same purpose by the use of IOTA. Respondent suggests that the funds derived from IOTA be used to provide legal services for the so-called poor instead of attempting to evade the immigration laws of the United States by making grants for that purpose.

On pages 15 and 16 of the petition it is said that Florida's community sense has declined. This may be so. If it has, a large part of the decline must be laid to the intervention of the

government in the private affairs of its citizens. The intervention in most instances has been sought by petitioners or their colleagues in philosophy. What they now seek to do is to decrease the sense of community by turning members of the Bar into the arm of a bureaucratic judicial system. The bureaucracy of the courts has already gone too far. In some instances the courts cannot now distinguish between what is right and what is wrong or what should be done and cannot be done. What petitioners seek is for the so-called poor to become files on a bureaucrat's desk in the same manner that adoptions, children in need and the like are now handled by our largest executive department. That is the great defect of the public defender system. The accused become file folders. A major reason for medical malpractice is because patients have become charts. If there is an overwhelming need (and respondent rejects this), there has to be a better way than forcing lawyers to become bureaucrats.

If we are less and less bound by a common heritage, common religion, shared history or common language, it is not something that the law can supply consistent with American constitutional principles. The law is not only not a cohesive force, it is a divisive one. It is the special privileges granted by many modern statutes that have done much to increase the divisions among religious and ethnic groups, master and servant and man and woman.

The high sounding language in the petition is inconsistent with the concepts of freedom, liberty and justice for <u>all</u>. What is sought is compulsion,not freedom. It is not justice they seek, it

is bureaucracy. It is not equal justice under law they seek, but an open door to judicial tyranny. If petitioners genuinely want to improve the administration of justice, there are may tasks that they can undertake. For example, the education of the profession is rapidly falling behind the needs. Many judges do not know what is a good pleading or admissible evidence. Admissions to the Bar of admitted embezzlers continues. The Board of Governors of The Florida Bar has become so large that it is impossible to fix responsibility or for the Board to operate properly and decisively. Petitioners like many others in the Bar, seek new programs and new adventures. They do not want to take the time and provide the effort to correct the problems existing in other programs that are far more essential. That work is tedious, unrewarding and does not gain publicity. So we go onward and forward until the new programs break the machine because no one wants to repair the old.

Respondent agrees with the response of Joseph W. Little and adopts what he has said in Section II of his response concerning the history of the common law, the constitutional objections to the petition and particularly the comment by Justice Terrell in the Gluck case, cited by Mr. Little. Tyranny by this Court is no less tyranny because it is exercised in what petitioners believe is a just cause.

This Court has also said:

> "And since the supposed promotion of the public welfare has almost invariably been the excuse for all the arbitrary and unjustifiable deprivations of life, liberty and property which have heretofore been committed, from the time pagan Emperors burned Christian martyrs in the imperial amphitheater at Rome to the date of the rendition of this

> opinion, the justification under our constitutional system for enacting laws interfering with property rights and individual freedom must be shown to rest upon considerations greater than the alleged promotion of the general welfare alone."

See L. Maxcy v Mayo, 139 So 121 (1932).

Respondent submits that while petitioners have the right to ask this court to make rule changes, the right is not absolute. Absolute rights lead to injustice just as absolute power corrupts absolutely. Petitioners, or their predecessors in interest, have asked this Court for mandatory pro bono once. This court denied the petition. In the absence of some significant change in facts or law, the petition should be summarily denied and petitioners should be told that this Court will not entertain future petitions that do not make appropriate change in circumstances allegations. In short, this Court should let petitioners know unequivocally that multiple petitions seeking the same relief will not be entertained in the ethical field any more than they would be entertained if this were an ordinary civil appeal.

ACTION BY THE COURTS AND THE BAR DEMONSTRATE THAT ACCESS TO JUSTICE IS NOT BEYOND OUR REACH

Respondent does not have enough financial information to determine whether petitioners are correct on this point. A start has been made with IOTA. This is precisely what respondent and Mr. Little feared all along. The funds are certainly being devoted to the support of political philosophies and concepts that respondent and many of his clients oppose. On page 20 of the petition the statement is made that legal aid does not receive funds from IOTA. Why not?

Respondent sees no distinction between being paid by the State for handling a criminal case and being paid by IOTA for handling a civil case. The result is the same. The lawyer has expended his time and talent and has been paid.

One of the fascinating statements in the petition is footnote 4 on page 5 when the petition says that it "...does not support the concept of lawyers being forced into involuntary servitude or mandated charity." What do they think they are asking for? Perhaps, bearing in mind the great Roman lawyer's statement that consistency is the virtue of small minds, petitioners are showing the depth and breadth of their intellect.

NATURE OF RELIEF SOUGHT

Respondent opposes the proposed change to Rule 1-3.1(a) of the Rules Regulation The Florida Bar and to Rule 2.065. If the Court rejects the proposal on Rule 1-3.1(a), the need for the change to Rule 2.065 disappears.

This rule proposes to tell each lawyer how he or she will spend the time that he or she devotes to unpaid public service. It must be done to provide aid to indigents. It cannot be performed in any other way. Respondent prefers another way. Respondent prefers that lawyers, as well as all other Floridians, be free to decide how to devote the time given to those who cannot or should not pay. Why should this Court or petitioners deprive lawyers of the right to decide to whom and for what purposes they will give their time for public service? Have petitioners presented any evidence that a trial court would accept showing a need for this radical and dictatorial concept? It is not only a question of the purse. It is a question of the philosophy. Petitioners have decided what public service is appropriate for all lawyers. They are no better than the totalitarian governments that try to make all of their citizens conform to certain standards. The difference between saying that a person must serve the poor as and when directed by a circuit judge is different only in degree from saying that a person must be an Aryan to be entitled to live.

CONCLUSION

There is nothing unethical or illegal about declining to help so-called poor people who have legal problems. Any American citizen has the right to believe "persons are not entitled to all of the help that they receive from the governments." They are entitled to believe that poor persons are not entitled to legal services free. In short, Americans are entitled to be different. Both the federal and state constitutions protect Americans from having to conform with the philosophies of others. The constitutions forbid the state and federal governments, including the judiciary, from imposing on Americans the rigid control that makes them like Waffen SS troops goosestepping in unison down Unter der Linden. One of the reasons for America's expansion and greatness has been its diversity.

Petitioners say that the poor deserve help. That is the foundation on which this petition is built. It may be true, but there is no proof of it. One of the things that governmentally inspired legal aid has done in this country is to clog the judicial machinery because the government has not at the same time furnished enough judges, clerks, courtrooms and the like. The question is not as simplistic as petitioners like to believe. They do believe that the end justifies the means.

I suspect a Londoner in 1495 would have been amazed to find that his King was going to give him free legal services. I have serious doubt that the statue cited by petitioners was ever implemented in the manner in which they now propose to implement it. As Mr. Little points out in his brief, it has been repealed.

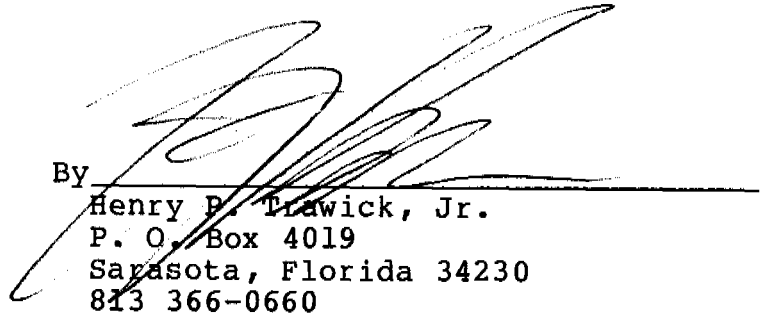
Obviously, it did not work. Respondent agrees with Mr. Little that the system proposed by petitioners will not work either.

Respondent does not agree with any part of petitioners' conclusion, except that access to justice is an obligation of society. Petitioners seek to place that obligation solely on this Court and lawyers. The "flexible rule" referred to by petitioners has no constitutional safeguards and depends on the unsupported opinion of the circuit judge in a non adversary proceeding--indeed, and no proceeding at all.

The only branch of our government that can properly evaluate the needs, if any there be, of so-called poor persons and provide adequately for those needs insofar as the law is concerned is the legislature. Petitioners ask this Court to ignore the system of checks and balances in the constitution and to abandon the proper sphere of judicial activity in granting the petition. Since they cannot, or will not, obtain the relief they seek before the legislative department of the government, they come to this Court and ask it to legislate under the doctrine of judicial supremacy. Short of all of its flowery rhetoric, the petition merely says to this Court that it has the power under the doctrine of judicial supremacy to decide this case and make the lawyers of Florida do what the petitioners want them to do.

The undersigned certifies that a copy of the foregoing has been furnished to Talbert D'Alemberte, Harvey Alper and John F.

Harkness, Jr. as Executive Director of The Florida Bar by mail on November 8, 1989.



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