W.O.O.A.

SUPREME COURT OF FLORIDA

RAUL R. SOTOLONGO,

Petitioner,

v.

ROBERT M. BRAKE,

Respondent.

_____/

FAMILY DIVISION

CASE NO. 91-165

SUPREME COURT CASE NO. 78,752

PETITIONER'S BRIEF

Jorge F. Gaviria
5901 S.W. 74 Street
Suite 400
Miami, Florida 33143
Fla. Bar No.886599
(305) 666-0345

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FACTS

Respondent, Attorney Robert M. Brake, was hired by the ex-wife in child support modification proceedings, at an agreed upon fee of $60.00 an hour. (See Report of General Master and Notice of Filing). Both, Respondent and the ex-wife were active members of a prepaid legal insurance plan. Id. Respondent was subsequently discharged by the ex-wife, and at the conclusion of the case, the General Master recommended that Respondent's attorneys fees be taxed against the ex-husband at the agreed upon rate between the Respondent and the ex-wife. The Court entered judgment based on the General Master's recommendations and findings of fact. Id.

Respondent filed an appeal with the Third District Court of Appeals, wherein the Court reversed and remanded for a new hearing consistent with the principles enunciated in Levy V. Levy, 483 So. 2d 195 (Fla. 3rd DCA 1986).

SUMMARY OF ARGUMENT

Attorneys fees awarded pursuant to Section 61.16 should not exceed the contractual amount between the ex-wife and her attorney when there is no showing that the ex-wife bargained with her attorney from an inferior financial position relevant to the ex-husband. The purpose of Section 61.16 discretionary fees awarded is to ensure that the less financially able party has equal access to the court. Therefore, if the courts find that the ex-wife had equal access to the courts, there is no need to enhance the agreement with her attorney and the Section 61.16 award should be limited to the contractual amount. This would be the most equitable result especially if, as in the case sub judice, the attorneys fees are taxed against the ex-husband when he was not privy to the agreement.

ISSUE

Whether attorneys fees awarded pursuant to Florida Statute Sec. 61.16 should exceed the agreed upon fees between the attorney and the ex-wife when the fees are taxed against ex-husband and there is no finding by the Court below that the ex-wife negotiated her attorney fees from an inferior financial position to that of the ex-husband.

ARGUMENT

Florida Statute Sec. 61.16 provides:

> ...The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount of attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings.

The purpose of Sec. 61.16 is to ensure that both parties will have similar ability to secure competent legal counsel. Canakaris v. Canakaris, 382 So. 2d 1197, 1205 (Fla. 1980). See also Standard Guar. Ins. v. Quanstrom, 555 So. 2d 828, 835, (Fla. 1990), wherein this Court stated:

> ...a significant purpose of this fee authorization statute is to assure that one party is not limited in the type of representation he or she would receive because of that party's financial pos inferior tp that of the other party.
>
> (emphasis added).

No where in the record in the case at bar is there a finding that the ex-wife's financial position was so inferior to that of the ex-husband that she would be precluded from seeking similar

competent legal representation or access to the courts in a matter contemplated by the Canakaris and Quanstrom cases cited above.

Petitioner does not argue that a fee agreement between the spouse and attorney in Chapter 61 proceedings shall always be binding. That position would defeat the purpose of Sec. 61.16 and could result in the denial of access to the courts to the impecunious spouse and thus, denial of due process. However, when there is no finding that a party in family law proceedings is at such financial disparity to the other party so as to jeopardize that party's equal access to the courts, then the agreed upon fees should be binding. To hold otherwise is inequitable and would foster potentially deceptive and misleading fee agreements between the attorney and the client. This is especially true when, as in the case sub judice, the party who pays the attorney's fee is not privy to the fee agreement, and thus, does not have the benefit of an arms length transaction.

In Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1151, (Fla.1985), this Court stated the general proposition that

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

Petitioner respectfully submits that absent compelling financial disparity among the parties, Rowe should apply in Sec. 61.16 cases.

Various court of appeals have taken the aforementioned view. In Winterbotham v. Winterbotham, 500 So. 2d 723 (Fla. 2nd DCA 1987), the court found that there was no showing that the wife was

required to fee bargain with her attorney from an ~~inferior~~ financial position which resulted in an otherwise unreasonably low fee arrangement. Therefore, the court held that:

> ... Rowe should apply and the court awarded fee should not exceed the fee agreement reached by the attorney and his client.
>
> citing Rowe at 1151.

The case at bar is similar to Winterbotham in that the ex-wife did not have to bargain from an inferior financial position in order to secure adequate legal counsel. The record below is devoid of any evidence that would suggest that the ex-wife bargained or negotiated attorney's fees from an inferior financial position or a forced fee-bargain; to the contrary, the fee was set by the parties so that it would parallel those set forth in the pre paid legal. program to which Respondent and the ex-wife were participating members of.

The ex-wife contacted Respondent through the Lawyer's Legal Insurance Corporation, wherein the ex-wife had prepaid legal coverage. Respondent willingly accepted a pre arranged rate of $60.00 per hour in other cases as part of the agreement with the pre paid legal insurance program. However, Respondent in this case is seeking a Sec. 61.16 award beyond the fee agreement and in doing so, Respondent is implicitly stating that the ex-wife was at a financial disadvantage and thus, the lower agreed upon fee of $60.00 an hour should be disregarded and substituted for a higher fee. But this argument on its face is without merit in light of the fact that Respondent routinely represents clients who are

members of the prepaid legal insurance program for $60.00 an hour regardless of the financial position of the client and of the adversary party. Therefore, the fee agreement had nothing to do with financial disparity or with negotiating a fee agreement from an inferior financial position which is what Petitioner suggests should be the controlling'criteriain order to award attorneys fees beyond the agreement.

The same conclusion was reached by the court in ~~Thomas v~~ Thomas, 418 So. 2d 316 (Fla. 4th DCA 1982), wherein the court found that an award of $4,000.00 was excessive under the terms of the contract between the former wife and her attorney. Thus, the Court reversed and on remand directed the lower court to reduce the attorneys fees to the contractual amount. Id. The same Court later in ~~Paylik v. Acoustic Engineering Co. of Florida~~ 448 So. 2d 638 (Fla. 4th DCA 1984) modified their earlier position on statutorily awarded attorney fees. Even though this was a mechanic liens case, the Court analogize it with a Sec. 61.16 award. In its concurring opinion, Judge Glickstein explained that Sec. 61.16 attorney fees should be awarded in light of the facts and circumstances of the particular case. Id. Judge Glickstein further elaborated on public policy principles which are consistent with Canaka~~ris~~ and its progeny, to wit:

> ...I am as concerned with mechanic's lien claimants' access to the courts as I am for a financially troubled spouse whose husband, the breadwinner, has taken a walk. A short-changed claimant and a financially desperate spouse are often in the same financial position because the party holding the purse strings removes the purse. It follows that in

> both situations, the idea is for the client and the lawyer to draft an agreement that provides for a reasonable hourly rate, with the understanding that the Code of Professional Responsibility may justify collection of more from the adversary. However, the client may be able to execute only an agreement which specifies less than a reasonable sum per hour because of the client's desperate financial condition in the precedence of personal principles that demand the client agree only to a fee within his or her expected financial means.

Id. at 641. (emphasis added).

Similarly, in Faust v. Faust, 553 So. 2d 1275, 1278, (Fla. 1st DCA 1989), the court found that there was uncontroverted evidence that the wife was required to fee-bargain with her attorney from an inferior financial position which resulted in an otherwise unreasonably low fee arrangement. Therefore, the Court awarded attorneys fees beyond the fee agreement.

Even assuming, arguendo, that the attorney's fees in this case should exceed the contractual amount, the contract limitation should still be considered in the equation, along with the "loadstar" approach enunciated in Rowe. According to In Re Platt, 586 So. 2d 328 (Fla. 1991), this Court stated that one of the primary reasons for the adoption of the "loadstar " method was the fact that someone other than client who received the services would be required to pay attorneys fees. Id. at 333. Rowe explained the "loadstar" method as a two step approach, namely a calculation of the number of hours reasonably expended in providing the services and as a second step, the court is required to determine a

reasonable hourly rate for the services of the attorney. Florida Patient's Compensation Fund v. Rowe, 472, So. 2d 1145 (Fla. 1985). In Platt this court elaborated on the reasonable hourly rate calculation, to wit:

> ... A reasonable hourly rate takes into account the rate charged in the community by the lawyers of comparable skill, experience, and reputation for similar services. Again, the trail court is not bound to accept the hourly rate asserted by counsel who performed the service. The court in this instance determines the appropriate hourly rate for the services performed. It is important that this determination be based on the fact that the fees will be paid regardless of the result.
>
> In Re Platt, 586 So. 2d 328, 334 (Fla. 1991).

In this case, respondent regularly charges to client members of the prepaid legal plan the rate of $ 60.00 an hour and is therefore presumed that this rate is the standard charged in that community by lawyers of comparable skill, experience and reputation for similar services.

Petitioner further points out that there are other relevant factors that should be carefully examined at in awarding Sec. 61.16 attorneys fees. The court should also determine whether the modification action brought by the party seeking fees was meritorious or was litigated in good faith and whether the actions of one party compelled the other party to resort to the courts for a remedy. Meloan v. Coverdale, 525 So. 2d 935 (Fla. 3d DCA), review denied, 536 So. 2d 243 (Fla. 1988).

If the courts look beyond the agreement between the spouse and

the attorney using financial parity as the sole criteria, and as a matter of course awards higher attorney fees, it does so at the risk of fostering further merit-less litigation. A. Matthew Miller, in his recent article published in the Florida Bar Journal stated:

> Attorney's fees, suit monies, and costs to be **saved** are the main incentive to settle for most people. What incentive does the impecunious spouse have if he or she does not believe, or has been advised by his or her attorney, that the impecunious spouse will never have to pay ? **...** As long **as** the courts give their silent consent, or tolerate or indulge the cost of unnecessary litigation engendered by anger, greed, or unreasonable or inflated expectations, by allocating the responsibility for the cost to the affluent spouse on principles of financial parity, irrespective of special circumstances, the innocent spouse in **a** financially superior position will be inequitably punished, and the guilty spouse will be inequitably rewarded.
>
> **A.** Mattew Miller, ~~Florida Bar Journal~~, May 1991 pg. 58

In this case, Respondent's client was held in contempt of court. Such behavior should not be rewarded by increasing the agreed upon attorneys fees when the other spouse is asked to pay. This inequitable result is what Mr. Miller argues is an incorrect application of a Sec. 61.16 award, namely the Petitioner would be inequitably punished and the guilty spouse or her attorney will be inequitably rewarded. The attorneys should encourage their clients to cooperate and assist in the judicial process, and the courts should take this variable into consideration when awarding fees under the discretionary fee provisions of Sec. 61.16. Furthermore, when the parties involve themselves in needless litigation and the

attorneys **are** financially **rewarded,** the ultimate victim in most cases are the children who's source of income has been depleted by forcing the spouse to pay attorneys fees. **See** generally Wrona v. Wrona, 16 FLW 3074 (Fla. 2nd DCA 1991).

Petitioner further emphasizes that when an attorney is discharged by her client **before** the matter has been concluded, the attorney may **recover** only the reasonable value of his **services** rendered **prior** to discharge, limited by the maximum contract fee. Rosenberg v. Levin, 409 So. 2d 1016, (Fla 1982) emphasis added. In the case at issue, Respondent was discharged prior to the matter being **concluded,** therefore, this Court should affirm the trial court's decision, wherein the fee **awarded** to Respondent equaled the contractual amount.

CONCLUSION

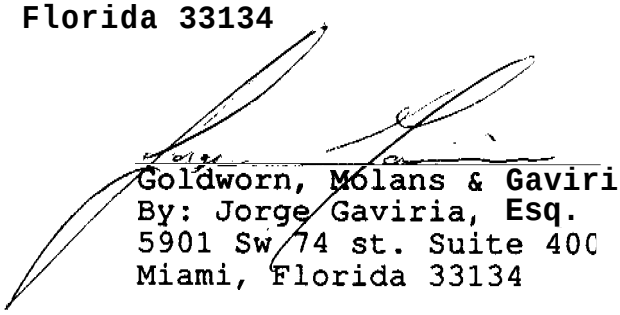
The fee agreement between the Respondent and the client ex-wife should not be altered in the absence of clear evidence that the client bargained from an inferior financial position, or that the client was financially unable to obtain counsel. In this case, the ex-wife contacted the Respondent attorney through a prepaid legal insurance plan, wherein the Respondent agreed to perform for a predetermined set fee. There is no evidence that the ex-wife bargained legal fees from an inferior financial position. Since the purpose of this statute is to ensure that each party has a similar ability to secure competent counsel and to litigate issues presented, it follows that under the facts of this case Respondents should not be awarded higher fees. Therefore, Rowe should apply and this honorable Court should reverse the District Court of Appeal.

Furthermore, Respondent was discharged by the ex-wife prior to a resolution on the merits. Therefore, Respondent's fees should be the quantum meruit of his services, limited by the contract amount. Thus, this Court should affirm the trial court's findings, and hold that Respondent's fees are limited to the contractual amount.

I hereby certify that a true and correct copy of the foregoing was mailed this 12th day of February, 1992 to

Michael Lechtman, Esq.
17001 N.E. 6th Ave.
North Miami, Florida 33162

Robert M. Brake, Esq.
1830 Ponce De Leon
Coral Gables, Florida 33134



Goldworn, Molans & Gaviria, P.A.
By: Jorge Gaviria, Esq.
5901 Sw 74 st. Suite 400
Miami, Florida 33134

APPENDIX

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1991

ROBERT M. BRAKE,

Appellant,

vs.

RAUL R. SOTOLONGO,

Appellee.

CASE NO. 91-165

Opinion filed September 10, 1991,

An Appeal from the Circuit Court for Dade County, Ronald M. Friedman, Judge.

Robert M. Brake, in proper person.

Goldworn,Molans & Gaviria and Jorge Gaviria, for ,appellee.

Before NESBITT, COPE and GERSTEN, JJ.

PER CURIAM.

Robert Brake appeals a final judgment awarding attorney's fees. We reverse.

Brake was counsel for Wilma Corwin, formerly known as Wilma Sotolongo, in a matrimonial matter. At the conclusion of the litigation, the court heard the application for assessment of

attorney's fees against former husband Raul Sotolongo, appellee here, pursuant to section 61.16, Florida Statutes (1989). The general master ruled that the award of attorney's fees could not exceed the hourly rate agreed on between Brake and his client Wilma Corwin, the former wife. Based on the rule announced in Levy v. Levy, 483 So.2d 455 (Fla. 3d DCA), review denied, 492 So.2d 1333 (Fla. 1986), we reverse and remand for further proceedings. We conclude that Levy remains good law and, contrary to the former husband's contention, has not been overruled sub silentio by Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990). See also Perez-Borroto v. Brea, 544 So.2d 1022, 1023 (Fla. 1989).* We therefore reverse and remand for a new hearing consistent with the principles announced in Levy.

Reversed and remanded.

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* The second district takes a somewhat different view. See Winterbotham v. Winterbotham, 500 So.2d 723, 724 (Fla. 2d DCA 1987). We adhere to our prior precedent on the point.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1991

ROBERT M. BRAKE,

Appellant,

vs.

RAUL R. SOTOLONGO,

Appellee.

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CASE NO. 91-165

Opinion filed December 10, 1991.

An Appeal from the Circuit Court for Dade County, Ronald M. Friedman, Judge.

Robert M. Brake, in proper person.

Goldworn,Molans & Gaviria and Jorge Gaviria, for appellee.

On Suggestion of Direct Conflict

Before NESBITT, COPE and GERSTEN, JJ.

PER CURIAM.

The appellee's suggestion of direct conflict is granted. Conflict is certified between the instant case and ~~Levy v. Levy~~, 483 So.2d 455 (Fla, 3d DCA), review denied, 492 So.2d 1333 (Fla. 1986), on the one hand, and ~~Winterbotham v. Winterbotham~~, 500 So.2d 723 (Fla. 2d DCA 1987) on the other.

Section 61.16 Awards — A Sword or a Shield?

F.S. §61.16 was not intended to be used as a sword to extort a settlement or put an affluent spouse at a financial disadvantage

by A. Matthew Miller

Section 61.16 of the Florida Statutes provides, inter alia, that the court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorneys' fees, suit monies, and the cost to the other party of maintaining or defending any proceeding under Ch. 61. The general purpose of an F.S. 561.16 award is to ensure that both parties will have an equal opportunity to employ competent counsel of equal ability, and will have an equal litigation budget to ensure an efficient preparation and presentation of the case.[1] Although F.S. 661.16 has been generally construed as a "financial parity" statute and was intended to be used by the legislature as a "shield" to prevent the impecunious or less-affluent spouse from being financially disadvantaged in the litigation by the affluent or more-affluent spouse controlling the purse strings. it was not intended by the legislature to be used as a "sword" to "extort" a settlement or to put the affluent spouse at a financial disadvantage in the litigation.

The opportunity to seek and obtain an F.S. §61.16 award must, of course, be jealously guarded by the courts in order to afford the impecunious spouse constitutional due process and access to the courts.[2] However, the courts should not be the unwitting accomplice of the attorney or litigant whose repeated deliberate acts are inconsistent with equitable principles and the standards of conduct expected and required of a member of the Bar and a litigant in a court of equity.

The courts must impose equitable standards and principles on the conduct of the litigation by the parties and their attorneys in assessing responsibility for litigation, fees, and expenses. A spouse who seeks to disrupt the normal flow of economic justice in a case through misconduct of the litigation or by pursuing unrealistic or unreasonable goals should not benefit from an F.S. §61.16 award to the financial detriment of the other spouse.

F.S. §61.16 awards should only be made after considering the extent to which the conduct of each party and their respective attorneys furthers or frustrates the public policy of the state to promote the settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys: and only after also considering to what extent the conduct or expectations of either party generated unnecessary, recalcitrant, vexatious, or fruitless litigation.'

In *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987), the court stated that:

It is the responsibility of the marital bar and the bench at trial and appellate levels to be mindful of unnecessary expense in the litigation of contested dissolution matters, as any other. This type of case must be tried and reviewed quickly, without needless and wasted motion. Without responsible direction, not only will the parties—who are represented—have their assets dissipated without good cause, but also their innocent, unrepresented children will see their opportunity for higher education vanish in a nightmarish plethora of motions, transcripts and time sheets.

We urge the Family Law Section of The Florida Bar and the Florida Chapter of the American Academy of Matrimonial Lawyers to consider our concerns. Equally important, we remind ourselves and all trial judges in our district that we are in a position to act upon what a senior member of the Broward County Bar has noted on his door for over 60 years; namely, that it is not how many hours one puts in, but what one puts into the hours.

Rule 4-1.5 of the Florida Rules of Professional Conduct sets forth the criteria for determining reasonable fees for legal services. Rule 4-1.5(C) specifically provides that the time devoted to the representation and the customary rate of fee need not be the sole or controlling factors.

After all is said and done, time and rate factors in consideration of reasonable fees should not supersede the concept of overall value. When one spouse is directed by the court to pay the other spouse's fees and litigation expenses, or a portion of them, pursuant to F.S. §61.16, the amount of the award should be limited to the reasonable value of services irrespective of time and rate considerations and only after consideration of the "special circumstances" referred to in Mettler *v. Mettler*, 569 So.2d 496 (Fla. 4th DCA 1990). F.S. §61.16 awards should never exceed a reasonable amount viewed in the context of the issues and the amount

involved in the litigation, how the recipient's expectations reasonably relate to the prospects for recovery or success, and an analysis of how unresolved anger or improper motivea have unnecessarily expanded the scope and expense of the litigation.

The impecunious or less-affluent spouse who engenders substantial and unnecessary litigation feea and expenees motivated by or in pursuit of unreasonable and unrealistic goals and expectations, should not be rewarded by the court, and likewise, the innocent affluent or more-affluent spouse should not be punished. The generation of unnecessary and substantial litigation fees and expenses by one party, of necessity, usually requires the other party to respond in defenee thereof, thereby engendering further litigation fees and expenses.

When a spouse's conduct of the litigation unnecessarily engenders recalcitrant or vexatious litigation and serves to frustrate the public policy of the state to promote settlement of litigation and, when possible, to reduce the cost of litigation by encouraging cooperation between the partiea and attorneys, the offending spouse should not be rewarded by an F.S. 961.16 award and further should, in fact, be required to pay that portion of the other spouse's fees engendered thereby. No apouee should be permitted by the court to believe that he or she is immune to or insulated from any financial responsibility for attorneys' fees, suit monies, and costs.

People engaged in marital and family law disputes are often locked into a psychological state of war which, by definition, is irrational. It is, therefore, incumbent upon, and the responsibility of, attorneys to be calm, objective, professional, and cooperative with one another at all times. Attorneys should be "counselors and healere:' not just advocates.[5] Attorneys must exercise compassionate restraint to control the emotions and reasonableness of the client and the conduct of the litigation, They must not get involved in the filing of bizarre motions and pleadings or get caught in the client's anger and quest for vengeance. Attorneys must act reasonably and with common sense at all times, and must be held accountable for inflating or furthering the client's inflated or unreasonable expectations for recovery.

Attorneys' fees, suit monies, and costs to be saved are the main incentive to settle for most people. What incentive does the impecunious spouse have if he or she does not believe, or has been advised by his or her attorney, that the impecunious spouse will never have to pay? The litigant, who has nothing to lose, loses nothing! Reason and logic must prevail and be rewarded. "Rambo" litigators must be discouraged and must not be rewarded.

People engaged in marital and family law disputes are often locked into a psychological state of war which, by definition, is irrational

As long as the courts give their silent consent, or tolerate or indulge the cost of unnecessary litigation engendered by anger, greed, or unreasonable or inflated expectations, by allocating the responsibility for the cost to the affluent spouse on principles of financial parity, irrespective of special circumstances, the innocent spouse in a financially superior position will be inequitably punished, and the guilty spouse will be inequitably rewarded. Attorneys will never counsel their clients to be reasonable or to reasonably limit the cost of litigation if they are financially rewarded by the court for unreasonable conduct at the expense of the innocent but more-affluent spouse. Parties' financial status should not insulate them from the consequences of their conduct within the judicial system. Additional work made necegsary by an unreasonable litigant pursuing unreasonable or unrealistic goals should not afford a basis for the offending party to obtain an F.S. 561.16 award.[6]

A spouse's anger or greed injures his or her cause and clouds judgment and reason. The necdlcss creation of issues to litigate, engendering enormous and unnecessary expense on both sides, has become commonplace. This use of the judicial systeni should not be condoned or further tolerated. The courts need to examine motives and the reasonableness of litigants' expectations and goals in the litigation in assessing responsibility for the payment of attorneys' fees and litigation expenses. A litigant should not gain leverage in the litigation through "legal blackmail" by engendering enormous, unnecessary fees and expenses either to financially "bury" the other spouse or to "starve" the other spouse into submission.

With a few noted exceptions,' the courts have not addressed, or sufficiently addressed, the problem. Protracted marital and family law litigation will continue until the day when the courts examine with closer scrutiny the motives and objectives of the litigation, carefully considering the reasonableness of the expectations and the probability of success, in assessing financial responsibility.

The purpose of an F.S. 961.16 award is to shield the impecunious spouse from the injustice and inequity resulting from being financially disadvantaged in the preparation and presentation of the case. It is not to place a sword in the hand of the impecunious or less-affluent spouse to gain financial leverage or advantage over the affluent or more-affluent spouse in the preparation and presentation of the case. A court should not be utilized by an attorney or a litigant as an instrument of revenge.

In a free society, competent individuals have the right to make decisions that are foolish or wrong as an exercise of and pursuant to their rights of self-determination. However, manufacturing and building up cases, creating false issues, and overlitigating cases to generate outrageous fees and expenses should not continue to be a time-honored tradition.

Members of the Bar, before riling any pleading or motion, or engendering any action or conduct as an advocate, should be as objective as the advocate's position will permit, should carefully analyze the law as it applies to that case, and only in those instances in which such analysis leads to an honest conviction that it is proper to proceed on a given course, should the journey begin or continue. The courts should make every effort to ascertain whether claims and defenses are presented honestly and in good faith. Justice should not be manipulated by unresolved anger or the

PAGE(S) MISSING

quest for vengeance, and leverage or advantage in the litigation should not be gained by fraud, deceit, misrepresentation, or inequitable or bad faith conduct by either a party or an attorney.

The award of attorneys' fees and *costa* in marital and family law proceedings at the appellate level should likewise not be based solely upon principles of financial parity or relative financial ability. The standard in marital and family law appeals should be more the "prevailing party standard" prevalent in other appeals. than a financial parity standard. The impecunious spouse should not automatically be awarded attorneys' fees on appeal simply because the affluent spouse is in a financially superior position. To do so would encourage any impecunious spouse to take an appeal regardless of how frivolous or specious it may be, knowing full well that it is not the impecunious spouse who shall bear the expense, but rather, the affluent spouse.

Consideration must be given to the relationship the fees bear to the merits and the reasonable expectations or prospects for success in the appellate court. An award of attorneys' fees on appeal should not be utilized to "punish" the affluent spouse, who has been successful, or to provide the impecunious spouse, who has been unsuccessful, with a "free ticket" to appellate review regardless of the merits or the prospects for success. Neither spouse should be awarded attorneys' fees on appeal for prosecution of a baseless or meritless appeal, or one for which the prospects for success are highly speculative. Services that are unreasonable or unnecessary under the circumstances should not be the financial responsibility of the opposing party.

In considering and reviewing the propriety and the merits of an appeal, both the attorney and the unsuccessful spouse should be required to consider the financial impact of the appeal, If the impecunious spouse is the unsuccessful spouse and is automatically awarded attorneys' fees on appeal, that spouse will never properly consider the merits or the cost of a proceeding in the appellate court.

An automatic award to the impecunious spouse of attorneys' fees obviates the necessity for determining whether an appeal should be filed. Unless the impecunious spouse is required to be financially responsible for his or her decision to appeal, based upon consideration of the merits and the reasonable prospects for success, the impecunious spouse would have no reason not to file an appeal regardless of the merits or the prospects for success.

It is appropriate that the merits or prospects for success on appeal be a factor in determining whether to award attorneys' fees on appeal. The decision of whether to appeal must have at least potential economic consequences to the appellant for attorneys' fees and costs. Such a rule would, no doubt, increase the parties' satisfaction with the trial court and decrease the number of costly appeals which are sometimes taken more from greed and/or vindictiveness than from merit. The potential cost to the impecunious spouse of taking an appeal as a factor, maintains the integrity of that decision-making process. The award of attorneys' fees on appeal should not merely be a matter of which spouse is in a superior financial position.

The legal system and the legal profession are, in general, in a period of great transition and reform. In this age of specialization and alternate dispute resolution, the bench, the Bar, and the law schools of Florida have endorsed a major recommitment to attorney professionalism. The Supreme Court and The Florida Bar have established a commission to implement the Supreme Court Gender Bias Commission report to eradicate gender bias in our courts. The Florida Supreme Court recently held that attorneys have an obligation, when admitted to The Florida Bar to provide legal services for the poor when appointed by a court, and that pro bono is a part of an attorney's public responsibility as an officer of the court.[8] An attorney is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.[9]

The administration of marital and family law in the judicial system is also in a period of transition and reform. Marital and family law cases today constitute a majority of the civil cases filed in our trial and appellate courts, and there have been major advances in the establishment and enforcement of child support, the establishment and implementation of guardians ad litem, and in the enactment and implementa-

tion of laws and procedures for the protection of children. The Commission on the Implementation of the Family Court has recommended that. the Florida Supreme Court institute a statewide family division of the circuit court by January 1, 1992. Yet there are those in the judicial system and the Bar at large of goodwill, whose voices arc yet unheard, whose course is yet unclear, and whose contribution to needed reform is yet unseen.

History will have to record that the greatest injustice in this period of transition and reform in the administration of marital and family law in the judicial system was not the ruthless and unethical conduct of the "Rambo" litigator, but rather, the appalling silence and indifference of attorneys and judges of sound moral fiber and utmost integrity. The apathy of those in powerful and influential positions must end. Something has to be done to correct the injustice of excessive litigation fees and expenses.[10] The courts must not continue to be part of the problem, but rather, the courts must be part of the solution. ❐

[1] See Lynn v. Lynn, 464 So.2d 614 (Fla. 4th D.C.A. 1985); Keister v. Keister, 458 So.2d 32 (Fla. 4th D.C.A. 1985); Peak v. Peak, 411 So.2d 325 (Fla. 5th D.C.A. 1982); Patterson v. Patterson, 399 So.2d 73 (Fla. 5th D.C.A. 1981); March v. March, 395 So.2d 200 (Fla. 3d D.C.A. 1981); Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980); Price v. Price, 382 So.2d 433 (Fla. 1st D.C.A. 1980); and Diaco v. Diaco, 363 So.2d 183 (Fla. 2d D.C.A. 1978).

[2] See Miller, *A Matter of Access to the Courts*, FAM. L. COMMENTATOR, December 1985.

[3] See Mettler v. Mettler, 569 So.2d 496 (Fla. 4th D.C.A. 1990).

[4] See *id.*: Steinfeld v. Steinfeld, 565 So.2d 366 (Fla. 4th D.C.A. 1990); Landers v. Landers, 550 So.2d 554 (Fla. 5th D.C.A. 1989); Thornton v. Byrnes, 537 So.2d 1088 (Fla. 3d D.C.A. 1989); Elenewski v. Elenewski, 528 So.2d 1354 (Fla. 3d D.C.A. 1988); Meloan v. Cloverdale, 525 So.2d 935 (Fla. 3d D.C.A. 1988); Henning v. Henning, 507 So.2d 164 (Fla. 3d D.C.A. 1987); Wiseblatt v. Wiseblatt, 452 So.2d 575 (Fla. 3d D.C.A. 1984); Broudy v. Broudy, *423* So.2d 504 (Fla. 3d D.C.A. 1982); Creel v. Creel. 423 So.2d 419 (Fla. 3d D.C.A. 1982); *Patterson*, 399 So.2d 73 (Fla. 5th D.C.A. 1981); Johnson v. Johnson, 396 So.2d 192 (Fla. 4th D.C.A. 1980); Jaffe v. Jaffe, 394 So.2d 443 (Fla. 3d D.C.A. 1980); Lewis v. Lewis, 383 So.2d 1143 (Fla. 4th D.C.A. 1980); and Lee v. Lee, 262 So.2d 6 (Fla. 4th D.C.A. 1972).

[5] Time charged or expended by the attorney for "handholding" or "nursing" the client may not be chargeable to the opposing party, see Guthrie v. Guthrie, 357 So.2d 246 (Fla. 4th D.C.A. 1978). in which the Fourth DCA held that "work done that is not reasonably necessary but performed to indulge the eccentricities of the client should more properly be charged to the client rather than the opposing party. However, constructive and compassionate "handholding" or "nursing" can help control the scope and conduct of the litigation thereby saving attorneys' fees and litigation expenses. Diffusing the anger or *greed* of a client in the early stages of the representation is usually positive and productive. The courts should indulge the parties by permitting a "cooling-off time" and should be sensitive to the fnct that marital and family law litigation is usually more emotionally charged than other cases. Mediation can also be effectively utilized to accomplish or assist in accomplishing these objectives.

[6] *See Mettler*, 569 So.2d 496 (Fla. 4th D.C.A. 1990).

[7] See n. 4.

[8] Amendments to RULES REGULATING THE FLORIDA BAR and RULES OF JUDICIAL ADMINISTRATION, ___So.2d___, 15 F.L.W. S651 (Fla. 1990).

[9] RULES REGULATING THE FLORIDA BAR, Ch. 4, Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities.

[10] The purpose of The Florida Bar is to inculcate in its members the principles of duty and service to the public, to improve the administration ofjustice, and to advance the science of jurisprudence. See RULES REGULATING THE FLORIDA BAR, Ch. 1, Purpose.

AUTHOR

A. Matthew Miller, Hollywood, is a fellow in the American Academy of Matrimonial Lawyers and is Florida Bar board certified in marital and family law. Mr. Miller is a frequent author and lecturer on subjects dealing with marital and family law. and is co-editor of the Journal's *Family Law Section column.*

This column is submitted OR behalf of the Family Law Section, Ira Abrams, chairman, and Renee Goldenberg and A. Matthew Miller, editors.

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