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IN THE SUPREME COURT OF FLORIDA
CASE NO. 82,725

JOHN H. FARO,

Petitioner,

vs.

ROBERT V. ROMANI and FARISH, FARISH & ROMANI,

Respondents.
_____/

ON PETITION FOR DISCRETIONARY CONFLICT REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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The Academy of Florida Trial Lawyers

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TABLE OF AUTHORITIES

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I. STATEMENT OF THE CASE AND OF THE FACTS

The Academy of Florida Trial Lawyers adopts the statement of the case and of the facts of the Respondents.

II. ISSUE ADDRESSED BY AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS

> Whether the calculation of the fee due an attorney discharged without cause should be calculated by (a) the "modified quantum meruit" approach adopted in *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982) or (b) the "lodestar" approach adopted in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985).

III. SUMMARY OF THE ARGUMENT

The Court should reaffirm its holding in *Rosenberg v. Levin* that traditional quantum meruit factors are to be employed in determining the amount of a fee owed to an attorney who is discharged without cause (provided that the fee may not exceed the contract amount); the Court should reaffirm that, in determining such a quantum meruit fee, the trial judge is entitled to consider the "totality of the circumstances"; and the Court should approve those lower court decisions holding that the requirements of *Rowe* do not apply to the determination of such an attorney's fee.

IV. ARGUMENT

Contingent fees, which are now strictly regulated by law, provide an important means of access to the courts for people of average means. Indeed, were it not for the contingent fee, the constitution's guarantee of right of access to the courts would be a hollow formality for many ordinary citizens. Accordingly (and subject to the pertinent regulations), The Rules Regulating The Florida Bar specifically authorize fees that are "contingent on the outcome of the matter for which the service is rendered." Rule 4-1.5(f)(1), The Rules Regulating The Florida Bar.

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When a lawyer agrees to represent a client for a contingent fee, the attorney agrees not only to perform legal services for the client, but also agrees to assume a significant financial risk on behalf of the client. If that lawyer then substantially performs his or her obligation to the client, both under the attorney-client contract and under the higher duty of an officer of the Court, but is discharged without cause before the final resolution of the case, how should the fee be calculated?

That, in essence, is the question before the Court -- and the question has already been definitively answered in *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982):

> We hold that a lawyer discharged without cause is entitled to the reasonable value of his services on the basis of quantum meruit, but recovery is limited to the maximum fee set in the contract entered into for those services....
>
> In computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client. Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations.
>
> We conclude that this approach creates the best balance between the desirable right of the client to discharge his attorney and the right of an attorney to reasonable compensation for his services.

Rosenberg, 409 So.2d at 1017, 1022.

The *Rosenberg* formula has served well. It protects the client's legitimate freedom in dismissing his attorney (the client will never have to pay more than the lower of the quantum meruit figure or the contractual fee), while guaranteeing the diligent and ethical attorney a reasonable fee for work performed prior to discharge. The quantum meruit analysis specifically recognizes that an attorney who is discharged without cause may be entitled to a fee that exceeds a reasonable hourly rate fee. As codified by The Rules Regulating The Florida Bar, a quantum meruit analysis authorizes the trial court to award a greater or lesser fee than would be required by an hourly fee:

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

Rule 4-1.5(c), The Rules Regulating The Florida Bar. Thus, under our rules of professional conduct, as well as under *Rosenberg*, the trial judge is directed to look to the "totality of the circumstances," and, depending upon those circumstances, may award a fee which is greater or less than the fee required by the number of hours multiplied by the reasonable hourly rate.

The "totality of the circumstances" approach allows the trial judge to achieve justice in circumstances where an hourly based fee would be unfair. For example, let us assume that an attorney has substantially completed representation of a client under a contingent fee contract; the vast majority of the litigation is now completed; a substantial offer has been made by the defense that is withinin the client's reasonable settlement expectations; there is no longer any contingency regarding whether the outcome will be success or failure -- the only remaining contingency is how great the success will be. Let us further assume that, at this point, (a) either the client knows that he can now discharge the attorney, without cause, and thereby pay only a fraction of the contractual fee; or (b) an associate or partner of the attorney knows that if he can "steal the client," he will be able to recover the contractual contingent fee, while paying only a fraction of that amount to the first attorney by way of a charging lien.

In either of these circumstances, use of an hourly rate based fee would be unfair to the diligent attorney, and would provide a windfall to the client or interloping attorney who acted improperly. To be sure, there are other circumstances where an hourly based fee is most appropriate. The

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Rosenberg formula allows the trial judge the latitude to consider such circumstances, and to determine whether or not an hourly rate based fee (or a lower fee) would be appropriate.

In this context, rejection of *Rosenberg* in favor of a mandatory lodestar analysis would really be the worst of all worlds. This is because the lodestar fee is by definition an hourly rate fee, albeit one that it is enhanced by a multiplier (if, indeed, a multiplier is employed). While such an approach is well suited for determining a reasonable fee to be paid by a third party to the attorney-client relationship, it is a poor method for determining the amount that a client should pay his own attorney. For example, by locking the trial judge to a lodestar hourly rate fee (even if it is coupled with a contingency fee multiplier), an attorney who generates a large number of hours in unproductive activity leading to a mediocre recovery might well receive a larger fee than a more skilful lawyer who does a better job for the client. Even more troublesome, an attorney who substantially completes the representation, but who is then replaced by subsequent counsel, would be limited to an hourly-rate based fee -- while the subsequent attorney who did little work of significance would be entitled to retain the balance of the contingent contract fee. Clearly, the trial judge should be entitled to consider the contractual fee in determining a reasonable quantum meruit fee for a lawyer discharged without cause.

In fact, the American Law Institute recommends that, under such circumstances, a fee award should be based upon the pro rata share of work that the attorney has performed under the contingent fee contract at the time of discharge. The Institute recommends that a lawyer who has been discharged after substantial performance (or after any severable part of the legal services are completed) may recover the compensation provided by his contingent fee agreement, minus the value of the services that remain to be performed. RESTATEMENT OF THE LAW GOVERNING LAWYERS §52 (Tentative Draft No. 4, April 10, 1991). Comment b to Section 52 notes that allowing a client to

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avoid paying the contractual fee by discharging the lawyer at the last minute is unfair. The client's right to change lawyers is, under this method, protected. However, the client should still be responsible for the pro rata share of the contingent fee that has already been earned by the lawyer, especially where the lawyer has substantially completed a severable part of the services he was obligated to perform.

If such a pro rata/quantum meruit approach is not employed, the client may simply fire his lawyer when the representation is nearly successfully completed, hire a new attorney, and thereby avoid, to a very great extent, paying the fee that he had agreed to pay at the outset. Likewise, another attorney could interfere, persuade the client to allow him to take over the representation, and retain the majority of the fee, whether earned or not.

As noted by the Fourth District below, "*Rowe* is simply inapplicable" to "a claim for a reasonable attorney's fee asserted by an attorney against the party contracting with the attorney." *Faro v. Romani*, 18 F.L.W. D2012 (Fla. 4th DCA September 15, 1993). And, as stated by the Third District:

> *Rowe* has no application here. The appropriate criteria for determining the value of the discharged attorney's services are enunciated in *Rosenberg*: "the totality of the circumstances surrounding the professional relationship between the attorney and client .. [including] .. time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract."

Trend Coin v. Fuller, Feingold & Mallah, P.A., 438 So.2d 919, 922 (Fla. 3d DCA 1989), *quoting Rosenberg*, 409 So.2d at 1022. *See also Stabinski, Funt & De Oliveira, P.A. v. Law Offices of Frank H. Alvarez*, 490 So.2d 159 (Fla. 3d DCA), *rev. denied*, 500 So.2d 545 (Fla. 1986). We respectfully submit that the conflicting decisions from the First and Second Districts simply applied *Rowe* in an inappropriate context and are therefore wrongly decided.

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V. Conclusion

For the foregoing reasons, The Academy of Florida Trial Lawyers submits that the decision of the Fourth District should be affirmed; those lower court decisions holding that the requirements of *Rowe* do not apply to the determination of such an attorney's fee should be approved; and the conflicting decisions of the First and Second Districts should be disapproved. The Academy further submits that the Court should reaffirm its holding in *Rosenberg v. Levin* that traditional quantum meruit factors are to be employed in determining the amount of a fee owed to an attorney who is discharged without cause (provided that the fee may not exceed the contract amount), and that, in determining such a quantum meruit fee, the trial judge is entitled to consider the "totality of the circumstances."

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was mailed this third day of February, 1994, to: Susan M. Rosen, Esq., Susan M. Rosen, P.A., 909 N.E. 26th Avenue, Hallandale, Florida 33009; Robert V. Romani, Esq., Farish, Farish & Romani, P.O. Box 3887, West Palm Beach, Florida 33402; John W. Thornton, as Trustee, Thornton & Mastrucci, Biscayne Building, Suite 720, 19 West Flagler Street, Miami, Florida 33130-4478; James J. McNally, Esq., James J. McNally, P.A., Biscayne Building, Suite 634, 19 West Flagler Street, Miami, Florida 33130; John Beranek, Esq., Aurell Radey Hinkle Thomas & Beranek, Suite 1000, Monroe-Park Tower, 101 North Monroe Street, Post Office Drawer 11307, Tallahassee, Florida 32301; Walter G. Campbell, Esq., Krupnick, Campbell, Malone, Roselli, Buser & Slama, P.A., 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Ft. Lauderdale, Florida 33316; Amanda K. Esquibel, Esq., Tilghman & Esquibel,

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