IN THE SUPREME COURT OF FLORIDA

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

CASE NO. 85,920

THE STATE OF FLORIDA,

PETITIONER,

vs.

MARK MARKS, P.A., ET AL.,

RESPONDENTS,

AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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INTRODUCTION

The Academy of Florida Trial Lawyers, a voluntary organization of lawyers who represent victims of the wrongdoing of others, files this amicus brief in support of the Respondents.

The Academy is in favor of full disclosure of information during litigation, as provided by rules and statutes. Further, the Academy is opposed to misrepresentations and falsehoods at any time. The issue in this case, however, is whether the State may criminally punish an attorney who, during negotiations before a lawsuit is filed, furnishes to an insurance company information which is neither false nor inaccurate. The portion of the statute at issue here purports to criminalize the furnishing of truthful information which is somehow deemed to be "incomplete."

As explained in this brief, the standards governing conduct during negotiations are neither clear nor precise. Indeed, to a considerable extent there are no rules or standards for conduct during negotiations. Because (1) the insurance fraud statute provides no guidance on what constitutes "incomplete information" in an insurance claim, and (2) there is no general understanding of what information must be disclosed during negotiations, and (3) "a person is entitled to clear notice of what acts are proscribed and is therefore given the benefit of the doubt when the criminal statute is ambiguous," *Ferguson* v. *State,* 377 So. 2d 709, 711 (Fla. 1979), the Academy submits that the district court properly concluded that the section of the insurance fraud statute referring to "incomplete information" in claims is unconstitutional.[1]

[1]The Academy expresses no opinion on the conduct of the Defendants in this case. Rather, our focus is the same as that of the district court of appeal—the unconstitutionality of the statutory provision under which the Defendants were charged. The Academy also expresses

STATEMENT OF THE CASE AND FACTS

As its Statement of the Case and Facts, the Academy adopts the relevant portions of the opinion of the district court of appeal.

SUMMARY OF THE ARGUMENT

The district court properly concluded that the statutory provision is unconstitutional.

The statute fails to state what information an attorney must disclose during negotiations, and there is no consensus on this issue within the legal profession. Many commentators have concluded that there is ***no*** duty to disclose information, and that an attorney merely must refrain from affirmatively making untrue statements. Because the statute does not define "incomplete information," and because there is no consensus, the statute is unconstitutionally vague.

These difficult issues concerning the conduct of negotiations must be resolved in the first instance in a civil context. The application of the criminal law, when there does not exist agreement on or understanding of what information must be disclosed, violates the constitutional principle that persons must be given fair notice of what conduct is criminal.

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no opinion on the other issues addressed in the district court opinion, or on the other charges against the Defendants.

ARGUMENT

THE DISTRICT COURT CORRECTLY FOUND THAT THE PORTION OF THE STATUTE WHICH MAKES A CRIMINAL OFFENSE OF THE SUPPLYING OF "INCOMPLETE INFORMATION" IN INSURANCE CLAIMS IS UNCONSTITUTIONAL

The statute at issue in this appeal makes it a crime to present a statement in support of an insurance claim, with intent to defraud, which contains "any. . . incomplete . . . information concerning any fact or thing material to such claim." § 817.234(1), Fla. Stat. The flaw of this statute, recognized by the district court, is that it fails to give notice of what information must be provided in making a claim. Without a explanation of what constitutes "complete" information, there is no way for a person to know what is "incomplete" information.

The State's attempt to uphold the statutory provision on the basis that it includes a specific intent requirement should be rejected, as it was rejected by the district court. Simply stating that an act is illegal when committed with fraudulent intent provides no guidance on what acts are prohibited,

In this brief, the Academy hopes to assist the Court by revealing a misconception underlying the State's arguments throughout this litigation. The State appears to believe that there are clear rules governing conduct during negotiations. Indeed, the State suggests that through its talismanic invocation of the phrase "specific intent," a person can easily determine what is acceptable and proper negotiating conduct. The reality is otherwise. There are few areas of the professional lives of lawyers about which it is more difficult to generalize than negotiations. In negotiations, as perhaps no where else in the law, there is little if any agreement on what conduct is proper. Certainly there is not sufficient agreement such that a vaguely

worded statute can be applied to punish those who violate the standards of negotiating, as asserted after-the-fact by the State.

A. There is little or no consensus on what constitutes proper conduct during negotiations

Section 817.234(1) contains no definition of what is meant by "incomplete information." It is true that under certain circumstances a statute which does not define a crucial term can be constitutional if common knowledge and practice are sufficiently clear so as to supplement the terms of the statute. For example, the term "kosher" has a sufficiently known meaning in the trade so that a statute prohibiting the false representation of food as kosher is constitutional. See *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925). However, the common practice of negotiations does nothing to supplement the statute here. Indeed, there is a remarkable lack of agreement on what is proper conduct during negotiations.

Courts, legislatures, and bar associations have rarely addressed the issue of standards of conduct for negotiations. "There is relatively little in terms of cases, statutes, rules, or regulations directly regarding the conduct of negotiations." MARK K. SCHOENFIELD & RICK M. SCHOENFIELD, LEGAL NEGOTIATIONS: GETTING MAXIMUM RESULTS 386-87 (1988). Most of the writings on the subject are by law professors, and these writings repeatedly emphasize the lack of agreement on standards of conduct during negotiations.[2]

[2]The Academy does not endorse the statements of any of the commentators cited in this brief. The statements are cited only to demonstrate the lack of consensus in the legal community.

For example, Professor Geoffrey C. Hazard, Jr., the Reporter for the Model Rules of Professional Responsibility (adopted as Florida's Rules of Professional Conduct), has written that there is a "lack of a firm professional consensus regarding the standard of openness that should govern lawyers' dealings with others and the lack of settled and homogeneous standards of technique in the practice of law. This lack of consensus indicates that lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation." Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties,* 33 S.C. L. REV. 181, 193 (1981). Similarly, Professor Charles W. Wolfram, the author of West Publishing Company's hornbook on legal ethics, has explained that "The question of the extent to which a negotiating lawyer may rely upon misrepresentations or play upon the ignorance of the other party to obtain a client advantage is one to which no easy answer exists." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 719 (1986).

Another distinguished law professor, James J. White, wrote in a publication of the American Bar Foundation that there is no general rule governing conduct in negotiations; instead, we are "hunting for the rules of the game as the game is played in that particular circumstance." James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation,* 1980 AM. B. FOUND. RES. J. 926, 929. Another scholar concluded that the rules designed to govern lawyers in their negotiations "are general and ill-defined enough to permit a very wide range of interpretations regarding appropriate negotiating behavior." Geoffrey M. Peters, *The Use of Lies in Negotiation,* 48 OHIO ST. L. REV. 1, 9 (1987).

Attempts have been made to establish standards for conduct in negotiations. A discussion draft of the Model Rules of Professional Responsibility contained a series of provisions devoted to negotiations, and included a comment which made clear that a lawyer has a duty to disclose "half-truths" in both litigation and in negotiations. See Gary Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers, 2* GEO. J. OF LEGAL ETHICS 411, 419 (1988). However, due to the variety of views on conduct in negotiations, nothing like this provision was included in the final version of the Model Rules. *Id*.

B. Reasons for the lack of consensus on standards of conduct during negotiations

There are a number of reasons for the lack of consensus on standards of conduct by lawyers during negotiations.

First, the lack of agreement in the legal profession mirrors the lack of agreement in society more generally. The Reporter for the Model Rules of Professional Responsibility explained that lawyers' standards of fairness are necessarily derived from those of society as a whole, and subcultural variations are enormous. Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties,* **33** S.C. L. REV. 181, 193 (1981). "Against this kaleidoscopic background, it is difficult to specify a single standard that governs the parties and thus a correlative standard that should govern their legal representatives." *Id.*

Second, while deciding on standards of conduct is difficult for all participants in negotiations, it is particularly difficult for attorneys. As the district court noted, attorneys are "guided by numerous different rules, laws, and cases dealing with the atypical obligations of an

attorney in an advocate role." 20 Fla. L. Weekly at D771. There are various statutes, rules, regulations, and customs involving disclosure of information by an attorney to adversaries. *Id.* at D772. These can pull in varying directions and can be in tension with a rule favoring complete disclosure of information.

In light of the differing views in society on negotiations, and in light of the special obligations of lawyers, it is unsurprising that there is no consensus among practicing lawyers. "More than almost any other form of lawyer behavior, the process of negotiation is varied; it differs from place to place and from subject matter to subject matter." James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying* in *Negotiations,* 1980 **AM.** B. **FOUND. RES.** J. 926, 927. In particular, "commentators have expressed a wide variety of views concerning the extent to which a negotiator should be permitted to withhold data that is favorable to the other party." Gary Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers, 2* **GEO.** J. **OF LEGAL** ETHICS 411, 411-12 (1988).

C. The few general principles concerning conduct during negotiations do not give notice that the supplying of "incomplete information" in an insurance claim can give rise to criminal charges

To the extent to which there is *any* consensus on standards of conduct in negotiations, it is that a lawyer need not disclose all information which conceivably may relate to the matter. Certainly nothing informs attorneys that the providing of "incomplete information" can subject them to criminal punishment.

In findings which raise difficult ethical questions, commentators who have studied negotiations, including negotiations by lawyers, have concluded that a certain amount of puffing is the norm. Indeed, some commentators have stated that more than puffing is common and proper:

> Virtually all negotiations involve seeking to persuade the other side that one's bottom line is higher than it really is, and that one's position is stronger than it really is, and may well involve tactics such as raising a false issue to create a basis for a later tradeoff. ***These actions, and therefore the negotiating process itself, involve less than total openness and candor, and entail misleading the other side to a degree. Such conduct, intrinsic as it is to the negotiation process, has long been established as ethically acceptable behavior.***

MARK K. **SCHOENFIELD** & **RICK** M. **SCHOENFIELD, LEGAL NEGOTIATIONS: GETTING MAXIMUM RESULTS** 383-84 (1988) (emphasis added). Another commentator has stated that a negotiator's goal is to mislead the adversary. James J. White, *Machiavelli* ***and the Bar: Ethical Limitations on Lying in Negotiations, 1980*** **AM. BAR** FOUN. **RES.** J. 926, 927. A negotiator, "like a poker player," hopes that the opponent will overestimate the value of his hand. ***Id.*** "The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be mislead." ***Id.***

Accordingly, commentators have concluded that in practically all negotiations—insurance negotiations,[3] business negotiations, dissolution of marriage negotiations, and even criminal plea bargaining negotiations[4]—there is less than full disclosure. There are critics of this

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[3] There is no reason to believe that insurance companies are any more forthcoming with unfavorable information during negotiations than any other negotiators. To the extent to which the "incomplete information" provision is used to criminally prosecute insurance claimants but not insurance companies, the statute may violate the equal protection clause.

[4] *See Bordenkircher v.* ***Hayes, 434*** U.S. 3.57, 367 (1978) (Blackmun, dissenting) (noting "[t]hat prosecutors, without saying so, may sometimes bring charges more serious than they

practice of incomplete disclosure, but all commentators recognize it: "[I]n the aggressive and imperfect world of twentieth-century business, the operating assumption is that both parties will, and should, attempt to obtain bargains that are not fair but good." **CHARLES W. WOLFRAM, MODERN LEGAL ETHICS *712 (1986).***

D. The common practice of selective disclosure of information in negotiations

Consistent with these principles, authorities have repeatedly stated that there is no duty to disclose unfavorable information during negotiations. The district court noted that this principle is stated in Florida Bar continuing legal education materials. ***State v.*** Marks, 20 Fla. L. Weekly D770, 774 n.3 (Fla. 4th DCA March 29, 1995). There is also support in Florida case authority for this principle. A district court of appeal recently noted that "Parties have always been free to exchange information in settlement negotiations but are not required to do so until initiation of litigation." ***Wilkinson v. Golden, 630*** So. 2d 1238, 1240 (Fla. 2d DCA 1994). See ***also*** Smiles *v.* Young, 271 So. 2d 798, 803 (Fla. 3d DCA 1973) ("imposing upon trial attorneys a duty to advise a plaintiff represented by competent counsel of every fact within a defendant's knowledge which might be material to the plaintiff . . . would be contrary to the adversary system for the determination of truth.").

Legal scholars are in general agreement that "[t]he law neither requires nor prohibits the disclosure of information that can influence outcomes in most bargaining interactions," and that "[t]he law generally has not required candor in negotiations." Gary

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think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage with a defendant. . , .").

Lowenthal, *The* Bar's *Failure to Require Truthful Bargaining by Lawyers, 2* GEO. J. OF LEGAL ETHICS 411, *435, 427 (1988). "I*n negotiations, truth is protected only against explicit attack. That is, negotiators are forbidden to lie, but they are generally encouraged to deceive in other ways." Geoffrey M. Peters, *The Use of Lies in Negotiation, 48* OHIO ST. L. REV. 1, 2 *(1987).*

In short, standards do not exist which give reasonable guidance to an attorney in negotiations on the requirement to disclose unfavorable information. Indeed, there is abundant authority that the providing of "incomplete information" in negotiations is not improper. According to many commentators, omissions are standard practice and expected, while explicit misrepresentations are agreed to be improper. This is so in various geographic areas, and in various legal specialties.

In the trial court, the assistant state attorney said that he was "absolutely shocked" by some of these materials which state that the disclosure of unfavorable information during negotiations is not required. (R.2128). The contrast of this comment with the writing of the scholars quoted above vividly demonstrates that there is no common understanding or agreement on disclosure requirements during negotiations.

The Academy strongly believes that these difficult and unsettled questions concerning conduct during negotiations cannot be resolved in the first instance through criminal prosecutions. A basic requirement of criminal law is that a person must be given fair notice that his or her conduct is considered to be criminal. The "incomplete information" provision of Section 817.234 fails to give adequate notice of what conduct during negotiations is criminal,

The civil justice system is more appropriate for the resolution of these issues. Indeed, even without any formal standards, the rule of the jungle fortunately does not prevail. The profession of law is, in an informal way, self-policing. "[I]n many circumstances informal norms can effectively regulate lawyers' behavior in the absence of formal rules." Gary Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. OF LEGAL ETHICS 411, *441 (1988)*. "A lawyer who violates accepted local standards for a particular type of law practice may develop a reputation for dishonesty among practitioners in the area. Credibility is essential for negotiation, and a tarnished reputation for honest dealing can damage a lawyer's negotiation effectiveness immeasurably." *Id*.

The statute, to the extent it attempts to make a crime of providing "incomplete information" in an insurance claim, is void for vagueness. The district court opinion on this issue should be affirmed.[5]

CONCLUSION

For the above-stated reasons, the Academy of Florida Trial Lawyers respectfully requests that the Court approve the district court's conclusion that the portion of Section 817.234(1) referring to "incomplete information" in insurance claims is unconstitutionally vague.

Respectfully submitted,

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[5]The Academy notes that under the district court opinion, the prosecution against the Defendants will continue even without the sections of the indictment based on the "incomplete information" provision of the insurance fraud statute.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true and correct copies of the foregoing were mailed this 12th day of September, 1995, to: Mark Hicks, Esq., Hicks, Anderson & Blum, P.A., New World Tower, Suite 2402, 100 North Biscayne Boulevard, Miami, FL 33132; H. Dohn Williams, Jr., Esq., P.O. Box 1722, New River Station, Fort Lauderdale, FL 33302; Archibald Thomas, III, Esq., Gulf Life Drive, Suite 1640, 1301 Gulf Life Drive, Jacksonville, FL 32207; Edward Shohat, Esq., Courthouse Center, Suite 1730, 17.5 N.W. 1st Avenue, Miami, FL 33128; Edward R. Carhart, Esq., 2151 South LeJeune Road, Suite 202, Coral Gables, FL 33134; Ronald Guralnik, Esq., 3225 Aviation Avenue, Suite 600, Miami, FL 331313; Neal Sonnet, Esq., One Biscayne Tower, Suite 2600, Two South Biscayne Boulevard, Miami, FL 33131; Ronald I. Strauss, Esq., 3225 Aviation Avenue, Suite 600, Coconut Grove, FL 33133; J. David Bogenschutz, Esq., 600 South Andrews Avenue, Suite 500, Fort Lauderdale, FL 33301; Richard L. Polin, Esq., Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, N921, Miami, FL 33101; and Charles Faircloth, Jr., Esq., Department of Insurance, Division of Insurance Fraud, 200 E. Gaines Street, Fletcher Building, Suite 649, Tallahassee, FL 32399.

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