IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Appellant,

v.

MARK MARKS, P.A., et al.,

Respondent/Appellee.

_____/

CASE NO. 85,920
T.C. NO. 90-6433CF
93-501 CF

ANSWER BRIEF OF RESPONDENT, MARK MARKS P.A.

On Review from the Fourth District of Appeal and the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida, Honorable Robert L. Andrews, Trial Judge

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Preliminary Statement

In this brief, the Respondent, Mark Marks P.A., will be referred to as the "Firm." Citations to the voluminous record will be made by the letter "R" and the appropriate page number. The trial court entered two orders of dismissal regarding two separate Informations, and the State appealed both orders. The District Court consolidated the appeals and records. References to that record will clearly designate which portion of each record is being referenced, and important portions of the record will be included in the appendix.

Statement of the Case and Facts

The dismissed charges concern third party tort claims, or adversarial, third party uninsured motorist (UM) claims, wherein the Firm did not send the tortfeasor's insurance companies all the claimant's medical records when it submitted its ***initial*** pre-suit "offer-to-settle" letter. This case concerns what a lawyer must disclose to, or in the alternative what a lawyer may withhold from, an adversary during arms-length pre-suit negotiations, without committing a crime. In this case of first impression, both the lower courts ruled that the portion of § 817.234(1), Fla. Stat., relating to presenting an ***incomplete*** claim, fails to give attorneys representing personal injury clients adequate warning that withholding or not disclosing information when submitting an ***initial*** pre-suit "offer-to-settle" letter to an insurance company is a crime. The lower courts held the statute's vagueness, regarding the submission of an incomplete claim, means it can be arbitrarily enforced, because it subjects an attorney to criminal prosecution any time he sends an ***initial*** pre-suit "offer-to-settle" letter to a tortfeasor's insurance company, which withholds arguably material information, including work product or confidential medical records. (appendix **A)**

The State gives an exhaustive review of the rulings of predecessor trial judge.' The predecessor judge was disqualified by the District Court for ex parte communications, regarding the order(s) **the** State is fond of **quoting.**[2] No wonder the State likes the reasoning of those orders. They were the "brain child" of the trial prosecutors, who prepared and the typed the orders. This Court should view those rulings as being the State's reasoning, and not the reasoning of a neutral detached magistrate,

Additionally, the State likes to inflame the issues to be considered and make the Firm's

conduct appear to be more onerous by stating its illegal activities included urging the exaggeration of pain and suffering by a client, and urging a client to have unnecessary surgery.[3] The State knows that pretrial discovery reveals the client denies she exaggerated pain and suffering. Pretrial discovery reveals the other client, also the State's witness, denies he was urged to have unnecessary surgery; and wishes he had followed his treating doctor's recommendation and had surgery because he is suffering. This client, a young black man, made disparaging statements about the Firm only after the State's insurance investigator mislead him by saying his white lawyer was stealing from his black clients, and had stolen $10,000 from him. The insurance investigator's statement to this client that the Firm stole $10,000 from him was a lie. Now, the State's insurance investigator denies making the statement.

In 1989, the Firm's offices were raided and the former Insurance Commissioner and candidate for governor held a press conference on the steps of the law firm. Months, later an Information was filed based on a variety of novel prosecution theories. Per an unrelated motion, a number of charges were dismissed, the State appealed, and lost. Motions to dismiss were filed as to other charges, and the State capitulated by nolle prossing the charges, before the motions were heard. All charges against five co-defendants were nolle prossed.[4] As to the remaining Defendants, who are the subject of this appeal, eight predicate acts of the Rico count and seven substantive counts were dismissed by the court, or nolle prossed.[5] (R. 1-98, 4 DCA case nos. 93-03259 & 93-03308).

The charges appear be more arduous, because the predicate acts of the racketeering count are "doubled up" as substantive counts, and the counts of insurance fraud are also charged as thefts; thereby creating a multi-count Information, Actually, the dismissed charges regarding

the submission of an "incomplete" statement, concern only six of hundreds of claims processed by the Firm during the same period.

The decision under review dismisses only those charges where the Firm is charged with presenting an ***initial*** pre-suit "offer-to-settle" letter to the insurance company, which failed to include all medical reports relating to its client. At this juncture, the only charges dismissed are those charged under that portion of the statute relating to the presentment of an incomplete claim. The decision under review effectively finds only one portion of the statute unconstitutionally vague -- the presentment of an ***incomplete*** claim.

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Predicate acts R and S of count 1 and counts 20 and 21, charge the Firm submitted an ***initial*** pre-suit "offer-to-settle" letter that failed to include as an enclosure Dr. Robert Kagan's opinion of an MRI scan of the claimant, Neomia Williams' lumbosacral spine. Dr. Kagan's opinion was protected by the work-product doctrine,[6] because it was a report of an expert retained in anticipation of litigation. (R. 1162-1214, 1483-1522, including Dr. Kagan's affidavit, 4 DCA case nos. 93-03259 & 93-03308) (appendix B, Dr. Kagan's affidavit)

The claimant was involved in an automobile accident, and taken to the hospital. She complained of pain in the knee, neck, low back and arm. An arthrogram performed by an orthopedic, who is not a defendant, revealed a serious knee injury needing arthroscopic knee surgery. The claimant filed a claim for personal injury benefits (PIP) with her carrier. Later, an uninsured/underinsured motorist (UM) claim was filed to recover her damages. It is the Firm's submission of an ***initial*** pre-suit "offer-to-settle" letter regarding her UM claim which the State claims violates the statute.

Before the ***initial*** pre-suit "offer-to-settle" letter was sent, Dr. Kagan was retained as an expert witness in anticipation of litigation to interpret an **MRI** scan of the claimant's lumbar spine. He did not treat the claimant, or even see her. The ***initial*** pre-suit "offer-to-settle" letter did not include his report relating to the lumbar spine, which opined there was no herniated disk. (R. **1195-1196, 4 DCA** case nos. **93-03259** & **93-03308) Concerning the lumbosacral spine, there was no claim made for a herniated disk. A claim was made for a low back soft tissue injury.** The "offer-to-settle" letter related verbatim the findings of the treating physician, who diagnosed a soft tissue injury. Even the insurance adjuster admits that the fact the lumbar spine MRI scan revealed no disc herniation, does not preclude a low back soft tissue injury, not detectable by a scan. (R. **1166-68, 4 DCA** case nos. **93-03259** & 93-03308) (emphasis added)

Predicate acts P and Q of count 1 and counts **18** and **19,** charge the Firm with presenting an ***initial*** pre-suit "offer-to-settle" letter to the tortfeasor's insurance company which omitted a medical report of Dr. Roscoe Thorne.[7] **This charge is perplexing, because long after criminal charges were filed and with full knowledge of the charges, the tortfeasor's insurance company negotiated a settlement and paid the claim.** The alleged victim disregarded the State's cry of fraud and paid the claim. (emphasis added)

The omitted report was for treatment for a worker's compensation claim which occurred eight months earlier, The treatment was billed to the worker's compensation insurance company, not the tortfeasor's insurance company. Even though the report related to her prior worker's compensation claim, the tortfeasor's insurance company knew about the report. Before it received the Firm's ***initial*** pre-suit "offer-to-settle" letter, the tortfeasor's insurance company

had already obtained her worker's compensation records. Additionally, *the initial* pre-suit "offer-to-settle" letter even advised the insurance company, the letter contained only a brief compilation of the claimant's damages. **The letter on its face said it was "incomplete. "** (R. 12151241)

Predicate acts FF, GG, and JJ of count 1 and counts 34 and 35, charge the Firm with withholding reports reflecting Dr. Gelety's expert opinion in submitting an *initial* pre-suit "offer-to-settle" letter to the tortfeasor's insurance company. Dr. Centrone, the claimant's treating physician, ordered an MRI to determine the cause of her continuing complaints of pain, She underwent an MRI scan. The next day, Dr. Centrone's partner, Dr. Gelety, who was not the treating physician and who never personally examined the claimant, interpreted the MRI scan as follows, "(t)here is no evidence of disc herniation into the lumbar spinal canal." Two subsequent reports of Dr. Centrone reflected Dr. Gelety's opinion. Later, a paralegal reviewing the claimant's medical records discovered an inconsistency in the medical reports. An MRI two years before, by another doctor, showed a bulging disc. Now, two years later, Dr. Gelety opined there was no bulging disc. The paralegal asked if Dr. Centrone, the treating physician, would "re-read" the scan film and explain the apparent inconsistency. Dr. Centrone for the first time read the MRI, and issued his own report which found a small posterior disc herniation at L5-S1. (R. 686-687)

After suit was filed, the tortfeasor's insurance company, per subpoena, obtained the omitted reports, **When the rules of discovery became operable, all reports were provided.** (emphasis added)

Since criminal charges were filed, two other experts have interpreted the MRI film, and

agree with Dr. Centrone's opinion.[8] (R. 693-695) **Dr. Gelety also revised his opinion. Dr.** Centrone was charged as a co-defendant, but his charges were dismissed per a sworn motion to dismiss, which was affirmed. State v. Centrone, 589 So.2d 913 (Fla. 4th DCA 1991). Dr. Centrone's delayed reading of the scan film, and the fact he disagreed with his colleague was not a crime.

Ironically, after charges were filed, it was discovered that the tortfeasor's insurance company also withheld information during pre-suit negotiations. (R. 965-1037) The claimant was injured in a slip and fall accident at a gas station. The pre-suit "offer-to-settle" letter opined that the gas station was liable, ". . . for allowing a dangerous and hazardous condition of spilled oil to exist on the pavement,. . . " (R. 969, 1007-1008) In response to the assertion, the insurance company took a statement from the gas station's manager, the only other eye witness to the accident besides the claimant. The gas station manager's statement clearly showed she had knowledge of the dangerous condition, could have stopped the dangerous condition, and may have exacerbated the dangerous condition. (R. 1014-1016) Notwithstanding this, the insurance company withheld her "statement" and denied liability. (R. 1018-1019)

The coverup regarding the denial of liability was exacerbated after suit was filed. The owner of the gas station, with the assistance of the insurance company's lawyer, answered an interrogatory asking how the accident occurred as follows, ". . . a prior customer spilled gasoline in the pump area.. . " (R. 1034) The answer is a misleading half-truth given the gas station manager's statement. When the insurance company's withholding of a material statement, as well as aforestated misleading answer to the interrogatory, were brought to the assistant state attorney's attention he declined to prosecute. The insurance company, its adjuster, and its

lawyer for doing the same thing -- withholding information -- are witnesses in this case, not defendants in a separate criminal case,

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These charges were developed by The Miami Herald, who has an interest in this case beyond news reporting. After being sued by some of the defendants for liable, it developed these charges and presented them to the prosecutor to gain leverage in its suit.[9] Counts 1, 2, 3, 5 and 7 concern *initial* pre-suit "offer-to-settle" letters which omitted a medical report, In each case, the claimants on one occasion were seen by another doctor, not their regular treating physician. The report by the fill-in or stand-by doctor was not submitted as an enclosure. (emphasis added)

Summary Of Argument

For the first time in the statute's two decade history, an assistant state attorney and a rookie investigator" with the Insurance Commissioner's Office developed a theory that § 817.234(1), Fla. Stat., requires a plaintiff's personal injury attorney when submitting an *initial* pre-suit "offer-to-settle" letter to enclose all information arguably material to a client's claim; otherwise, the letter is fraudulently incomplete. This interpretation requires an attorney engaged in *initial* pre-suit negotiations to disclose all information **arguably** material to the damage claim, including work product and confidential medical records; otherwise, the attorney may be subject to criminal prosecution. If the State's theory is accepted, fear of criminal prosecution will create pre-suit open-file discovery. The assistant state attorney wants this Court to uphold his interpretation, so he can substantially reform the practice of personal injury law. (emphasis added)

The dismissed charges concern ***initial*** pre-suit "offer-to-settle" letters submitted by an attorney regarding clients' third party tort claims, or UM claims, Both of which are adversarial, third party claims for damages. The prosecutor says the "offer-to-settle" letters were fraudulently "incomplete" because they omitted information arguably relating to liability, loss, injury or expense. Even though the claimants and the insurance companies were engaged in an adversarial relationship, the prosecution opines the attorney must, before filing suit, disclose all arguably material information to his client's adversary. The prosecution's theory rejects the accepted, customary practice that during pre-suit negotiations adversaries emphasize the strengths of their cases and do not voluntarily disclose weaknesses. It cannot be over emphasized that all the dismissed charges concern pre-suit adversarial claims, before the post-suit civil rules of discovery enable parties to discover their opponents' weaknesses.

The lower courts correctly found: (1) that the statute does not create a duty to disclose all information arguably material to loss, injury or expense; (2) that the statute does not adequately warn attorneys that certain customary pre-suit practices are against the law, and (3) that the statute's vagueness as to what constitutes an ***incomplete*** claim means it is susceptible to arbitrary enforcement.

Additionally, the Firm believes the subsection (1) of § 817.234 is unconstitutional in its entirety, because it violates equal protection. The statute makes it a crime for a plaintiff's personal injury attorney pursuing a **third party damage claim** to submit a pre-suit "offer-to-settle" letter which withholds any information material to the claim. But, if the insurance company or its adjuster withholds material information from a claimant, they risk no jail sentence because the have not committed a crime. Such disparity of treatment is constitutionally

irrational.

Dismissal of the all or some of the charges is proper for two additional reasons. First, the statute punishes the submission of an *incomplete statement* in support of a claim. An attorney's pre-suit "offer-to-settle" letter is **not** a "statement" within the meaning of § 817.234(6), Fla. Stat. Hence, it can never constitute an incomplete statement. Second, regarding combination PIP and UM claims, the statute conflicts with the PIP statute; thus, the more specific PIP statute controls the dissemination of medical records.

The theft charges should be dismissed because they are inseparably intertwined with the allegations of violating § 817.234(1), Fla. Stat, The State theorizes that § 817.234(1) creates a duty to disclose, or a duty not to withhold material information. Thus, a breach of this duty also violates the omnibus theft statute, which punishes fraudulent omissions. However, if § 817.234(1) creates no such duty, there is no fraudulent omission, and consequently no violation of the theft statute.

Argument

Point 1

Attorneys would not perceive the customary practice of personal injury law violates § 817.234(1), because it is vague and fails to give adequate warning of what conduct is prohibited, such that it is susceptible to arbitrary enforcement.

In construing the vagueness of § 817.234(1), the context it which it is being applied must be stressed. The dismissed charges arise from a personal injury attorney's representation of clients pursuing adversarial, third party tort claims. **All the dismissed charges concern the presentment of an initial pre-suit "offer-to-settle" letter to the insurance company, regarding a tort claim, which failed to include all medical information relating to the**

claimant. All the dismissed charges concern pre-suit negotiations before the civil rules of procedure relating to discovery are applicable. For example, one charge *concerns* an *initial* pre-suit "offer-to-settle" letter that failed to include as an enclosure the report of an expert retained by the Firm to evaluate the claimant in anticipation of litigation, The expert never saw, much less treated her. He only reviewed her MRI. While another charge concerns the submission of an *initial* pre-suit "offer-to-settle" letter to the tortfeasor's insurance company which omitted a medical report prepared by a doctor regarding the claimant's earlier workers' compensation claim. Even though it was not enclosed with the letter, the tortfeasor's insurance company already knew about the report, because it had already obtained the claimant's workers' compensation records. (emphasis added)

Contrary to the State's hypotheticals, all the claims that are presently dismissed (ie. submitting incomplete claims) concern real accidents, real people being taken to the hospital, and a plethora of medical information being voluntarily given to the tortfeasors' insurance companies. But, in *the initial* pre-suit "offer-to-settle" letter some medical information was omitted.

Before considering the statute's vagueness and lack of warning of the consequences of withholding a medical report, this Court must keep in mind other related constitutional provisions, statutes, court rules, and precepts related to the practice of personal injury law.

First, medical information and hospital records are confidential by statute. Florida Statutes 455.241(2) and 395.017 create a statutory privilege of confidentiality in medical information and hospital records. State v. Wenger, 560 So.2d 347 (Fla. 5th DCA 1990); Adelman Steel Corp. v. Winter, 610 So.2d 494 (Fla. 1st DCA 1992). However, the privilege is not absolute and

there are exceptions, Absent consent, there are three pre-suit exceptions: (1) records may be furnished to the person who obtained or furnished medical treatment for the patient; (2) records may be furnished to the Department of Professional Regulation pursuant to its authority to regulate doctors; and (3) records may be furnished in a worker's compensation case upon request of the employer or its insurance carrier, however, the use of the records by the employer/carrier is confidential and the records are not discoverable in any civil or criminal suit. **There is no pre-suit exception for a third party tort claim.** (emphasis added)

Contrary to the State's argument, medical information and hospital records do not lose their confidential status, because the client/patient makes them available to his lawyer. The passing of confidential medical information from one confidant to another confidant, who are working in the interest of a joint client, does not vitiate the privilege. For example, the umbrella of protection of the work product doctrine extends to non-lawyers, or professional persons, such as accountants. Cannon 4, DR 4-101, (E), former Code of Professional Resnonsibilitv; United States v Marvland Shipbuilding & Drvdock Co., 51 F.R.D. 159 (D.C. Md. 1975).

Second, medical information is protected by the constitutional right of privacy. There is a federal and state constitutional right of privacy in medical information. Rasmussen v. South Florida Blood Service, 500 So.2d 533, 536 (Fla. 1987); Roe v. Wade, 14 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); United States v. Westinghouse Elec. Corn., 638 F.2d 570, 577 (3rd Cir. 1980). (emphasis added)

Third, medical information may be work product. The work product doctrine was created by judicial decision and later codified.[11] The medical opinion of an "expert retained

in anticipation of litigation" is work product. Wackenhut Corn. v. Crant-Heisz Enterprises, Inc., 451 So.2d 900 (Fla. 2d DCA 1984); Myron v. Doctors General Ltd., 573 So.2d 34 (Fla. 4th DCA 1990); Ruiz v. Brea, 489 So.2d 1136 (Fla. 3rd DCA 1986).

Next consider during pre-suit negotiations of a personal injury case, before the civil rules of discovery are applicable, medical information falls into three categories: (1) reports of "treating physicians" protected by § 455.241, (2) hospital records protected by § 395.017, or (3) reports of experts retained in anticipation of litigation protected by the work product doctrine. What other categories does medical information fall into?

The statute under attack

Florida Statute 817.234(1) provides any person who, with the intent to injure, defraud, or deceive any insurance company presents any written statement as part of, or in support of, a claim for payment of benefits pursuant to an insurance policy knowing that such statement contains any ***incomplete*** information concerning any fact or thing material to such claim commits a crime. The term "statement" is defined to include ", , .but is not limited to any notice, statement, proof of loss, bill of lading, invoice, account, estimate of property damage, bill of services, diagnosis, prescription, hospital or doctor records, x-ray, test result, or other evidence of loss, injury, or expense." § 817.234(6), Fla. Stat.

A. Vagueness

A two-tier test is used for evaluating vagueness. First, because we assume that man is free to steer between lawful and unlawful conduct, a law must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and

discriminatory enforcement is to be prevented, a law must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Gravned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). If a criminal statute is involved, "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. " Lanzetta v. New Jersey, 306 U.S. 45 1, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). The courts tolerate a lesser degree of vagueness in enactments with criminal rather than civil penalties. See Wyche v. State, 619 So.2d 231 (Fla. 1993) (loitering ordinance void for vagueness, because it left to police the unguided task of differentiating between constitutionally protected street encounters and acts reflecting the state of mind needed to make an arrest).

F.S. 817.234 contains no guidelines of any type as to what information may be withheld, or must be submitted with an *initial* pre-suit "offer-to-settle" letter regarding an adverse third party insurance claim. Most importantly, the statute is completely silent as to whether work product and confidential medical records may be withheld. The statute leaves to prosecutors the unguided task of deciding what information is privileged, confidential, or protected work product. For example, a client is injured in an automobile accident caused by an uninsured, third party tortfeasor. She complains of pain in the knee, low back, both legs, and arm. The treating physician opines a low back soft tissue injury. In anticipation of litigation and before

beginning settlement negotiations, an expert is retained to interpret an MRI scan of the low back. The expert never sees the client, or treats her. The expert opines the low back scan reveals no evidence of disc herniation. So, no claim is made for a herniated disc of the low back. The expert's report is not sent with the *initial* pre-suit "offer-to-settle" letter. A claim for damages is made for a soft tissue injury of the low back (back sprain) in accord with the treating physician's diagnosis. Does the statute require pre-suit disclosure of the expert's work product opinion? It must, because this is the fact pattern of one of the dismissed charges.

The term *incomplete* is too open-ended when applied to an adversarial third party claim. If anything is omitted or not disclosed to one's adversary, in submitting the "offer-to-settle" letter, it may be deemed *incomplete.* Thus, an *incomplete* claim for damages can mean anything a prosecutor wants it to mean. An insignificant transgression or omission may be prosecuted, so long as it can be argued the non-disclosed information is arguably material to loss, injury or expense. Remember, the original **Information** included the allegation that the Firm failed to include the medical reports of two doctors regarding one of the charged claims. This allegation was abandoned after the Firm filed a motion to dismiss alleging that the reports were favorable to and supported the claimant's claim. The Firm argued that no one, not even an attorney, would withhold medical reports which supported a clients's claim. Even though the State re-filed the charges eliminating the allegation, this insignificant transgression or omission resulted in the Firm being criminally charged with failing to disclose the two doctors reports.

The statute is susceptible to arbitrary application because of its "catch-all" nature, as demonstrated by the conflict between § 817.234(1) and the workers' compensation statute. F.S. 817.234(1) includes workers' compensation claims, but there is also a separate workers'

compensation claims statute.[12] It is worded substantially the same as the statute, except it does not include the term "incomplete." The workers' compensation statute does not criminalize the filing of an "incomplete" claim. May an attorney representing a workers' compensation claimant file an "incomplete" claim without running the risk of criminal prosecution? No! An enterprising prosecutor may charge him with filing an "incomplete" claim under § 817.234. If the lawyer relies on the workers' compensation statute, he runs the risk of prosecution. If he is aware of this statute, the lawyer will err on the side of disclosing everything, including work product, rather than face criminal prosecution. Two statutes, worded substantially similar regulating the same conduct create confusion and the risk of arbitrary enforcement, where one makes it a crime to omit information and the other does not.

Vagueness is demonstrated by the fact that during the ongoing debate about the constitutionality of the statute, the assistant state attorney and the Attorney General differed about withholding medical reports, whether favorable, inconclusive or unfavorable. Originally, the assistant state attorney opined that **all** medical information had to be disclosed when submitting the *initial* pre-suit "offer-to-settle" letter. Again, the oriainal Information included the allegation that the Firm failed to include the medical reports of two doctors, which turned out to be favorable to the client's claim. The State recognized that no one, not even a lawyer, would withhold medical reports which supported a clients's claim. So, the State abandoned its simple counting theory -- report A was in the lawyer's file, but report A was not sent to the tortfeasor's insurance company, so a crime has been committed.

Then, the Firm challenged that the statute was unconstitutional in so far as it obligated an attorney to disclose privileged material, such as work product. So, the assistant state attorney

again modified his argument. Now, he opined that a claimant's attorney must give the insurance company all medical reports relating to the claimant's condition, unless the attorney can establish to a criminal court jury's satisfaction the withheld report is "privileged or confidential."

When the Attorney General entered the legal battle, the argument was modified further. He opines that a claimant's attorney may withhold a medical report when submitting an insurance claim. Where there are conflicting medical evaluations. the claimant's attorney may withhold an unfavorable medical evaluation, if he has other credible evaluations supporting the claimant's claim. (State's brief to the District Court p. 25 and brief before this Court p. 30) The difference of opinion between the two prosecuting authorities is significant. The Attorney General's interpretation does not restrict the non-disclosure of unfavorable information to just "privileged or confidential" information. Unfavorable medical information may be withheld, if the attorney believes the favorable medical reports are more accurate.

This significant difference of opinion is amply demonstrated in predicate acts FF, GG and JJ of count 1, case no. 90-6433CF. The Firm is charged in submitting an *initial* pre-suit "offer-to-settle" letter which failed to disclose a report of Dr. Gelety. The client sought treatment from Dr. Centrone. When the client continued to complain about pain, the treating doctor ordered an MRI. Another doctor in the office, Dr. Gelety , who never saw, examined or treated the client, interpreted the MRI. His interpretation conflicted with numerous other visits and observations of the client's treating physician, and even conflicted with an MRI that was performed years before. Later, her treating physician finally reviewed the MRI, he differed with Dr. Gelety's opinion. Later, to other experts concurred with Dr. Centrone.

The charge is based on the assistant state attorney's theory that a crime was committed

because the conflicting report should have been disclosed. **But, consistent with the Attorney General, the Firm was justified in withholding a conflicting, unfavorable medical evaluation, because it had other credible expert evaluations supporting the client's claim.** Even though the Firm has two other expert opinions agreeing with Dr. Centrone, and Dr. Gelety has revised his opinion, the charge is still being pursued. (emphasis added)

The prosecutorial authorities have modified their argument three times. Each time the zone of what may be withheld has been expanded. Originally, no medical information could be withheld; then confidential or privileged medical information may be withheld; and lastly confidential and privileged medical information may be withheld, plus unfavorable medical information may be withheld, if the attorney has a conflicting favorable report. If the prosecutorial authorities disagree about when medical reports may be withheld, the statute creates the opportunity for arbitrary, discriminatory enforcement making it unconstitutional. If the statute was not vague, the prosecutorial authorities would never have revised their argument three times.

B. Failure to give adeauate warning creates confusion

The statute does not give plaintiffs' personal injury attorneys fair warning of the consequences of exercising the work product doctrine during the course of practicing their profession. The statute gives no clear warning when the line is crossed concerning the proper exercise of the work product doctrine. Plaintiffs' personal injury attorneys are denied due process because the statute fails to give them sufficient notice of when their exercise of the work product doctrine becomes a crime. § 90.502, Fla. Stat.

Attorneys exercising the work product doctrine on behalf of clients are in the same

quandary as the lawyer in State ex rel. Lee v. Buchanan, 191 So.2d 33 (Fla. 1966). That case involved a statute[13] making it a felony to charge more than "reasonable charges or fees" for legal services in connection with adoptions. The lawyer was charged with having received compensation in excess of what was reasonable. The Court, in declaring the statute unconstitutionally vague, wrote:

> We can characterize the crime set out in the statutory proscription before us as a new offense, since there is no decision under it; nor have we found any precedents or case law from other jurisdictions dealing with a like statute. **There are no appropriate common-law guidelines as to what one can lawfully do under the statute, and there is no familiar practice or workable standard for use by attorneys in applying it.. .One** jury and judge, applying the statute, could find as unreasonable a given fee, while another jury and judge under identical circumstances could conclude that a larger fee was proper. This could be especially true as to the range of fees found reasonable in the so-called higher and lower income and cost living areas of the state. An attorney, searching earnestly for precedents in an effort to keep to what is safe, could not possibly know but could only speculate as to why one lawyer was adjudged a felon and the conduct of another deemed not violative, when the fee charged by the latter was perhaps considerably in excess of the one charged by the former under a seemingly parallel situation. As apt today as when pronounced is the observation of the court in United States v. Reese, 1876, 92 U.S. 214, 23 L.Ed. 563, 'It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. ' "
>
> We simply say that the statutory section in question is too vague and indeterminate to establish for guidance of attorneys an ascertainable standard of guilt. Id at 37. (emphasis added)

Given that the statute was a new offense created by the legislature and not rooted in the common law, this Court opined that proscribed guidelines were necessary, so attorneys would be sufficiently warned as to what was prohibited.

Compare, § 817.234(1), Fla. Stat., is a malum prohibita offense created by the legislature. It too is not derived from the common law. So, there are no appropriate common

law guidelines. What one attorney considers work product, his adversary considers discoverable. One jury and judge, applying the statute, could find as unreasonable the withholding of a document, while another jury and judge under identical circumstances could conclude the conduct was proper. In an effort to thwart insurance fraud, the legislature set a net large enough to catch all possible offenders, and leaves it to the prosecutors and courts to say who can be rightfully detained and who gets released. The legislature must set guidelines as to what is proscribed, and what must be disclosed when making an insurance claim, and make specific provision for the exclusion of privileged and confidential material.

The dilemma of attorneys in exercising the work product doctrine on behalf of clients is strikingly similar to the predicament of two parents convicted of child abuse murder by failing to provide their daughter with conventional medical treatment. Hermanson v. State, 604 So.2d 775 (Fla. 1992). The parents, in accord with their religious beliefs, practiced "healing by prayer." The child, an undiagnosed diabetic, died because it was not given conventional medical treatment. The parents challenged that the statutes did not give them fair warning of the consequences of practicing their religious belief of spiritual healing. They challenged they were denied due process because the statutes failed to give them sufficient notice of when their treatment of their child, in accordance with their religious beliefs, became criminal. This Court agreed and reversed their convictions.

The parents were convicted of third degree murder by violating § 827.04, Fla. Stat., which makes it a crime for a parent to fail to supply a child with adequate health care. However, two non-criminal statutes qualify or modify the child abuse statute by creating a "spiritual treatment exception," which provides a parent legitimately practicing his religious

beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone, [14]

This Court wrote, ". . .the legislature has failed to clearly indicate the point at which the parents' reliance on his or her religious beliefs in the treatment of his or her children becomes criminal conduct. If the legislature desires to provide for religious accommodation while protecting the children of the state, the legislature must clearly indicate when a parent's conduct becomes criminal.. . 'Whatever choices are made.. . both the policy and the letter of the law should be clear and clearly stated, so that those who believe in healing by prayer rather than medical treatment are aware of the potential liabilities they may incur."' Id., 604 So.2d 782.

The parents were faced with a choice -- follow the broad general mandate of the child abuse statute and give their child conventional medical treatment, or rely on the statutory spiritual treatment excention and allow their child to be healed by prayer. But, the law gave no guidance of when a parent goes too far in relying on healing by prayer. At what point does the exercise of "spiritual healing" become criminal child abuse?

Plaintiffs' personal injury attorneys too are faced with a statutory choice during pre-suit negotiations -- follow the broad general mandate of § 817.234(1) and disclose all medical information material to their client's case, or rely on the confidentiality statutes and withhold information falling under the umbrella of protection of the work product doctrine, and medical and hospital records statutes. Attorneys are in a quandary, because there is no clear line of demarcation as to what is exempted from disclosure, so they do not run afoul of the statute. The statute does not clearly state, nor give guidance of when an attorney has gone too far in relying on the work product doctrine or medical records privilege. At what point does exercise of the

work product doctrine become a crime? When a prosecutor opines it does.

The lack of clear warning is reflected in the Florida Bar CLE courses, which teach attorneys to "exclude" unfavorable information about their clients during pre-suit settlement negotiations, as part of the advocate's duty to emphasize the strengths of his client's cause. Illustrative of this point, a lecturer offered an anecdote about a personal injury claimant whose treating orthopedic opined that she had a 0 percent impairment rating.

> "Urn, that scared me a little bit as to how I was going to handle that because for some reason impairment ratings are still real critical to insurance carriers in evaluations.
>
> ***
>
> So I decided to work around that shortcoming through the preparation of a pretty extensive settlement brochure which I did. It ended up being about a 25-page letter with about 2 inches worth of exhibits and about 20 different exhibits and photographs and everything else in the world that YOU could think of except reference to the impairment rating. And that case settled, I had serendipity, I mean it just, it went great and nobody ever asked the question. **"Urn, you know there's no crime against that.** See The Florida Bar - Continuing Legal Education Audio-cassette, Basic Personal Iniurv 1989 (course number 6471, Taped 2/7/-8/89, Tape III of V). (also available on videocassette) (appendix B)

CLE courses, long after the statute was enacted, teach:

(1) **"There is no crime in purposely withholding a report of the treating physician that the claimant has no disability when the attorney knows it is critical to the insurance company's evaluation."** The Florida Bar Continuing Legal Education Committee, Tenth Annual Basics of Personal Injury Litigation 1989 Seminar, course number 6471, taped lectures, tape III of V. (appendix B)

(2) **"...Plaintiff's counsel has a real strategic advantage in that you can control the flow of information that's being provided the other side. You're not in suit, so there's no subpoena power of court and what is furnished to the carrier at that point in time is really up to you."** Randy R. Briggs, Basic Personal Injury 1989, course #6471, The Florida Bar, Continuing Legal Education Audiocassette. (appendix B)

(3) **"Control the flow of information...You have complete control of the flow of information...strengths of the case can be developed and presented while**

weaknesses are not fully discoverable...This advantage is underscored when skeletons need to remain in the closet." Basics of Personal Injury Litigation 1989 Seminar, The Florida Bar Continuing Legal Education Committee, p. 5.7. (appendix C)

(4) **During settlement conference, do not give up anything, unless you get something in return, and present the strengths of the case.** The Florida Bar Continuing Legal Education Committee, The Basics of Personal Injury Litigation, 1986 Seminar, lecture outline materials of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadows & Olin P.A. (appendix D)

The CLE materials do not advocate illegal activity, nor do they supplant the legislature's prerogative, as suggested by the State. The significance of the CLE materials is that they show there is no clear "bright line" rule as to what may be withheld without committing a crime. The CLE materials reflect statewide, not just in Broward County, personal injury lawyers do not interpret § 817.234(1) the way the prosecutor interprets it.

According to the State's interpretation the CLE lecturer, who offered an anecdote about a personal injury claimant whose treating orthopedic opined that she had a 0 percent impairment rating, committed a crime. The lecturer made and printed this comment a over a decade after the statute was enacted, Given his prominence in the Bar and that fact that he was teaching "new" lawyers the basics of personal injury law, such a comment would never have been made if for an instant he thought it was a crime to limit discovery during pre-suit negotiations.

If the statute gives attorneys fair warning and sufficient notice that pre-suit work product must be disclosed, why do learned scholars continue to teach that work product may be withheld? Concerning the disclosure of a client's medical information in the pre-suit stage, the Florida Practice Guide: Personal Injury,[15] co-authored by United States District Court Judge William Hoeveler, teaches lawyers to make selective disclosures of medical information during pre-suit negotiations. The manual advises that the plaintiff should not give an insurance

company an omnibus authorization for release of medical information. (appendix D)

The legislature has evinced the intent to protect the attorney-client privilege, including the work product doctrine, and to make confidential medical records. It has also evinced the intent to prevent insurance fraud. However, the legislature has failed to clearly indicate the point at which attorneys may no longer rely on work product doctrine or medical records privilege to withhold information from an insurance company when pursuing a client's pre-suit third party claim.

C. The statute punishes innocent activity

When applied to attorneys pursuing adversarial, third party claims on behalf of clients, the statute violates substantive due process, because it may be used to punish innocent activity. To comport with substantive due process a statute must bear a reasonable relation to a permissible legislative objective and not be discriminatory, arbitrary, or oppressive. The central concern of substantive due process is to limit the means employed by the government to the least restrictive way of achieving its permissible goal.

In considering whether a statute violates substantive due process, the basic test is whether the government can justify the infringement of its legislative activity upon personal rights and liberties, The statute must bear a reasonable relationship to a permitted legislative objective and must not be capable of arbitrary, discriminatory application. If there is a legitimate governmental interest which the statute aims to effect; if the statute is a reasonably related means to achieve the intended end; and if the statute is incapable of arbitrary, capricious and discriminatory application, it will be upheld. See Wvche v. State, supra; Potts v. State, 526 So.2d 104, (Fla. 4th DCA 1987), aff'd 526 So.2d 63 (Fla. 1988); In re: Forfeiture of 1969

Piper Navajo, 592 So.2d 233 (Fla. 1992); State v. Walker, 461 So.2d 108 (Fla. 1984).

It is not reasonable to assume that when a plaintiff's personal injury attorney withholds information, while attempting to negotiate a pre-suit settlement of a third party claim, that he does so for the purpose of criminally defrauding the insurance company. Yet, if an attorney withholds information, the prosecutor has unbridled discretion to file charges. For example, the original Information alleged the Firm filed a fraudulently "incomplete" offer-to-settle letter by withholding the reports of two doctors. The State's reasoning was very simple - the doctors' reports relating to her medical condition were omitted, so a crime was committed. The State applied the statute in a mechanical manner - medical reports withheld from the third party tortfeasor's insurance company equals probable cause for the filing of a criminal charge. The Firm moved to dismiss the allegation on the grounds the reports were favorable to her case and must have been inadvertently or mistakenly omitted. When this was pointed out, the State dismissed the allegation. (R. 401-465, 4 DCA case nos. 93-03259 & 93-0308) Nonetheless, the Firm was initially charged with a crime for withholding favorable medical reports from its client's adversary. This example clearly demonstrates (1) that the statute's broad language is not the least restrictive way of achieving the permissible goal of prohibiting insurance fraud, and (2) that the statute is capable of being used in a discriminatory, arbitrary or oppressive manner.

Curtailing insurance fraud is a legitimate purpose, but the statute fails. By its broad language, a personal injury attorney may be charged with a crime for engaging in the following "innocent conduct": (1) inadvertently or mistakenly withholding documents pertinent to the client's physical or mental condition, whether favorable to, inconclusive, or adverse to the client's position; (2) withholding work product documents; (3) withholding medical information

and hospital records privileged by statute and the state and federal constitutional rights of privacy; (4) withholding medical information in accord with the PIP statute (see argument infra); and (5) withholding information in accord with the customary pre-suit practice of personal injury law as taught by The Florida Bar continuing legal education courses and learned treatises.

The means chosen is not narrowly tailored to achieve the objective of preventing fraud through the least restrictive alternative. It reaches far beyond the intended purpose of preventing the filing of fraudulent insurance claims. Assisting clients with damage claims is the lawful business of attorneys practicing personal injury law. The statute may be used to impermissibly interfere with the practice of personal injury law by compelling plaintiffs' attorneys to disclose all information material to clients' claims, including privileged or confidential information, or run the risk of prosecution.

D. Proof of intent does not save the statute

The State's defense of the statute is that proof of intent "saves" the statute, because merely submitting an "incomplete" claim is not a crime. There must be an intent to defraud. **"Proof of intent" did not prevent the Firm from being wrongly accused when charges were originally filed.** Remember, the original Information included the allegation that the Firm also failed to include two medical reports in submitting an initial pre-suit "offer-to-settle" letter. The reports were favorable to the client's claim. (emphasis added)

The law is clear the State does not need direct proof of scienter in a fraud case. r , circumstantial evidence of criminal intent can suffice, and is a question of fact for the jury. Fraudulent intent may be inferred from conduct, United States v. Nivica, 887 F.2d 1110, 1113 (1st Cir. 1989), cert. denied U.S. ___, 110 S.Ct. 1300, 108 L.Ed.2d (1989). Applying

this principle, the State may file a charge on the basis that reports relating to the claimant's medical condition were omitted. Then, argue it is up to a jury to review the content of the reports and decide whether the reports were withheld with the "intent" to defraud, because information adverse to the client, and favorable to the insurance company was withheld.

Proof of "specific intent" does not always save an unconstitutionally vague statute. In State v. Rou, 366 So.2d 385 (Fla. 1979), it was alleged that Rou used his official position to secure a "special privilege" for Mr. Smith by locating a public road adjacent to Smith's property, contrary to the county's established road program, and thereby enhancing the value of Smith's property. The statute under which Rou was prosecuted provided, "(n)o officer or employee of a state agency, or of a county.. .shall use, or attempt to use, his official position to secure special privileges or exemptions for himself or others, except as may be otherwise provided by law. " This Court held the statute was unconstitutionally vague and left its enforcement to the whims of prosecutors, because it did not convey a sufficiently definite warning as to what was prohibited. This Court opined that the terms "special privileges or exemptions" afford no guidelines, no ascertainable standard of guilt, no barometer by which a public official may measure his specific conduct.

The state argued the statute was constitutionally sound because the prosecutor had to prove beyond a reasonable doubt that the officeholder acted with a "specific intent" of benefiting himself or another, This Court rejected this argument stating, "(t)he public official must be able to gauge his actions against a specific code of conduct, not a loosely worded statement of public policy, no matter how desirable the goal." Id. at 386.

In State v. DeLeo, 356 So.2d 306 (Fla. 1978), DeLeo was indicted for official

misconduct. The statute provided:

> (1) "Official Misconduct" means the commission of one of the following acts by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:. . .
>
> (c) Knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office. § 839.25, Fla. Stat.

The indictment charged that while an employee of the City of Hollywood, he knowingly violated, with corrupt intent to obtain benefit himself that he had employment or held a contractual relationship with a business entity subject to the regulation of or doing business with the City. The trial court dismissed the indictment. On appeal, the state argued that the violation must be proven to have been committed with "corrupt intent, " so this element prevented its arbitrary application. This Court held the element of "corrupt intent" did not save the statute. "All that it is necessary for intent to be corrupt is that it be 'done with knowledge that the act is wrongful and with improper motive'. . .The 'corruption' element, as defined, does nothing to cure the statute's susceptibility to arbitrary application." Id. 356 So.2d at 308. This Court opined that official misconduct under subsection (c) was keyed into the violation of "any statute, rule or regulation, pertaining to the office of the accused." This phrase was too vague and theoretically, using this definition, an employee could be charged for violating a minor agency rule applicable to him.

In State v. Llopis, 257 So.2d 17 (Fla. 1971), Llopis was charged with violating § 112.313(6), Fla. Stat, by being employed by a city as an inspector, and **"...knowingly** and unlawfully accept other employment which might impair his independence of judgment in the performance of his public duties, to wit: employment as a watchman by B & B Construction Co.. . .(which was) engaged in construction within the (city). . . " This Court applied the rules of

law: (1) that statutes penal in nature must be strictly construed according to the letter thereof, (2) that penal statutes are to be strictly construed in favor of the person against whom the penalty is sought to be imposed, and (3) that such strictures place a correlative duty upon our legislators to use clear, unambiguous language. In doing so, this Court held the statute vague beyond redemption. This Court reasoned that under the language of the statute it was impossible to say what employment will, in fact, impair the independent of judgment of a person described in the statute, because the statute contained no barometer, or ascertainable standard of conduct, so those governed by the statute would know when they were violating the statute.

The State relies on this Court's rejection of two vagueness challenges to provisions of the welfare statute. In Riggins v. State, 369 So.2d 948 (Fla. 1979), the defendant contended the food stamp fraud statute[16] was unconstitutionally vague. The Court held that fraudulently failing to disclose a "material fact" encompasses any fact which would affect eligibility for the program, such as being employed. **Measured by common sense, anyone should know being employed would be a material fact.** Sanicola v. State, 384 So.2d 152 (Fla. 1980), concerns the constitutionality of welfare fraud statute.[17] The defendant was charged with welfare fraud, because she failed to disclose her husband was employed. She contended the phrase "change in circumstances" was vague. This Court held that by reading the chapter in its entirety, it was clear what types of changes were applicable. Given the purpose of the chapter -- benefits for unemployed people -- being employed would certainly be one of the circumstances governing eligibility for unemployment-type benefits.

The welfare/food stamp statutes do not regulate or concern an adversarial relationship, such as a pre-suit third party tort claim. Rather, the subject matter of these statutes concerns

eligibility for government largess. The subject matter of these statutes does not encompass legal principles such as work product, the confidentiality of medical information, etc. Even a moron knows welfare payments and food stamps are for unemployed, **not** employed, people. (emphasis added)

The State cites Nicholson v. Kellin, 481 So.2d 931 (Fla. 5th DCA 1985), where the plaintiff, who was never involved in the vending machine business, entered into an agreement to purchase ice vending machines from the defendants' company. Along with the purchase agreement, the plaintiff entered into agreements whereby the defendants' company would manage and maintain the ice vending machines. The plaintiff did so on the representations: (1) that the company was a viable, profitable company; (2) that the defendants were uniquely qualified regarding the management of ice machines because of their prior business experience; (3) that the defendants' had the requisite knowledge regarding locations and maintenance of the machines; and (4) that the defendants had for years managed thousands of ice machines. In fact, it was a Ponzi scheme with no machines being managed and operated.

Nicholson concerns the sale of a business opportunity. The relationship of the parties was "buyer to seller," not adversaries pointing the finger of blame. The defendants in Nicholson were in a unique position to know if their company was profitable, or if they even managed any ice machines.

In contrast, the relationship between an insurance company and a third party liability claimant are significantly different. **First,** a third party personal injury plaintiff and the insurance company are adversaries, with the plaintiff asserting the insurance company's insured is at fault. Second the plaintiff and insurance company are on an equal footing. An insurance

company does not routinely accept an adversary's representations as gospel. It does its own independent investigation. The pre-suit relationship between personal injury plaintiff and the insurance company is aptly described in the article titled, "Settling the Case -- Defendants." 4 AmJur. Trials 289-439. The article discusses settlement strategy and evaluation of claims from the perspective of the insurance company and its lawyers; emphasizes that the insurance company must conduct its own investigation and cannot rely on full voluntary disclosure by the claimant; and recognizes that claimants emphasize the strengths of their case and do not disclose **the weaknesses,**

> A defense attorney will not progress far in settlement negotiations unless he has the fullest possible knowledge of the facts of the case. His **own investigation,** or that of his client, should go as far as possible in ascertaining those facts. However, to **the** extent that **plaintiff's counsel has factual information available to him that he is unwilling to disclose, the** progress of settlement negotiations will **be** impeded. **How much disclosure should be made by each side to the other is a practical question,** the determination of which depends on the particular case and on the personalities of the lawyers involved.
>
> The use of discovery processes may prove necessary to learn certain necessary facts. 4 AmJur Trial 384 (emphasis added)

Through the national index system, available only to insurance companies, an insurance company can cross-reference a plaintiff, a plaintiff's attorney, and the treating doctor to ascertain a prior medical history of the plaintiff, prior settlement practices history of the attorney, and even the plaintiff's and attorney's prior relationship with the treating doctor.

E. The Court cannot cure the statute by rewriting it

The "problem" cannot be corrected by creating an aftirmative defense, or exception for privileged or confidential material, such as work product, By its plain terms, the statute makes no exception for such material. Criminal prosecution may flow from the nondisclosure of

information arguably material to a damage claim. There is no indication the legislature intended any "ifs, ands, or buts" be read into the statute. Courts cannot rewrite statutes to cure an omission by the legislature, or to add to them. Yet, this is exactly what the State is doing by exempting privileged and confidential material.

Even if this Court creates an exception for work product or confidential medical records, the State wants to place the burden of proving the defense on the attorney. It wants the attorney to carry the burden of convincing the jury the withheld information is privileged or confidential. The State merely elicits proof the attorney withheld arguably material information. Then, the attorney bares the burden of convincing the jury the information withheld is privileged or confidential. Requiring an attorney to prove withheld information is privileged is an impermissible shifting of the burden of proof.

If this Court creates an exclusion for privileged information, the determination of privilege is not a proper jury question. See Hermanson v. State, supra, ("spiritual treatment exception" is **not** a jury question.) Query: Would a jury understand, or more importantly accept as proper -- strategic maneuvering by an attorney which results in material information being withheld from his adversary ? Compare, in the run-of-the-mill civil tort suit the tortfeasor usually requests all the plaintiff's medical opinions. The plaintiff will disclose the reports of the experts expected to be called as witnesses at trial, but will refuse any other reports claiming the work product doctrine and/or the medical records privilege. If the tortfeasor does not accept this, the matter will be arbitrated by the judge. If the judge overrules the plaintiff's claim of privilege or confidentiality, the plaintiff may seek review by writ of certiorari. But, the plaintiff's lawyer is not charged with a crime for failing to voluntarily disclose the information.

See Adelman Steel Corn. v. Winter, 610 So.2d 494 (Fla. 1st DCA 1992). (refusal to disclose medical records resulted in a writ of common certiorari, not a criminal prosecution). Yet, this all too common scenario becomes a crime per the State's interpretation.

F. Rule of Lenity

The rule of lenity applies. Ambiguity concerning the ambit of a criminal statute is resolved in favor of lenity and in favor of the accused. Lenity is appropriate where there is conflict between statutes. State v. Llopis, 257 So.2d 17,18 (Fla. 1971). In this case, there is both ambiguity and conflict. The ambiguities are: (1) Does § 817.234(1) exempt confidential and privileged material, such as work product or confidential medical records? (2) What constitutes an *incomplete* insurance claim? and (3) Does an attorney violate the statute by practicing the teachings of the Florida Bar's CLE programs?

Regarding conflict, § 817.234(1) conflicts with: (1) the medical and hospital records statutes concerning the disclosure of medical and hospital records during pre-suit negotiations, (2) the work product privilege, as codified by statute and the rules of professional conduct, and (3) the constitutional right to privacy in medical records. Even law enforcement officials conflict over "what" may be withheld. The assistant state attorney now says attorneys may withhold confidential or privileged material. The Attorney General does not limit nondisclosure to just privileged or confidential material. The Attorney General says selective disclosure may be made, so long as the attorney believes what is disclosed is more accurate than what is withheld. Amidst the ambiguity and conflict, the benefit of the doubt must go to the Firm by affirming the order of dismissal.

Point 2

The trial court's dismissal of the insurance charges and the inter-related theft charges was right for the wrong reasons. An "offer-to-settle" letter is not a "statement" within the meaning of the statute; so an incomplete letter is not a crime. The statute is unconstitutional in its entirety. The statute conflicts with the PIP statute.

The trial court's dismissal of the charges was "right for the wrong reason." Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1950).

An offer-to-settle letter is not a "statement"

F.S. 817.234(1) provides any person who, with the intent to injure, defraud, or deceive any insurance company presents any *written statement* as part of, or in support of, a claim for payment of benefits pursuant to an insurance policy knowing that such *statement* contains any *incomplete* information concerning any fact or thing material to such claim commits a crime. The term *statement* is defined to include ", , .but is not limited to any notice, statement, proof of loss, bill of lading, invoice, account, estimate of property damage, bill of services, diagnosis, prescription, hospital or doctor records, x-ray, test result, or other evidence of loss, injury, or *expense,* " § 817.234(6), Fla. Stat, Thus a *statement* is evidence or proof relating to liability, loss, injury or expense, such as a tape-recorded statement, an affidavit, bill of sale, receipt of purchase, etc.

Each of the charges is predicated on the Firm presenting a **letter** on behalf of a client which did not include as an enclosure a specific medical report. An "offer-to-settle" letter, or so-called demand letter, is **not** a *statement* within the meaning of the statute. It is certainly **not** any of the specifically enumerated items -- x-ray, test result, etc. It is **not** evidence of anything much less evidence of loss, injury or expense.

Of the cases decided under § 817.234, one needs to be discussed regarding this point. In Book v. State, 523 So.2d 636 (Fla. 3rd DCA 1988), the defendant's car was stolen. He had theft insurance, so he made a first party claim for benefits per his insurance policy. This was a first party claim for benefits, not an adversarial third party damage claim. He gave his insurance company a tape-recorded statement that the purchase price was $57,000, and followed that up with an "affidavit of vehicle theft" which stated the purchase price was $50,000. His statement or his affidavit, as the purchaser/owner of the car, would be "evidence" of the car's original purchase price. His taped statement and affidavit of purchase are "evidence of loss, injury or expense, " and thus are "statements" within the meaning of the statute.

In our case, the letter, which forms the basis of the prosecution, was merely an offer-to-settle, or an offer of compromise an adversarial third party damage claim within the meaning of § 90.408, Fla. Stat., relating to offers of compromise. The law provides that an offer to compromise a third party tort claim, which is disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible. At the time the letters were sent, both the validity of, and the value of, the claims were certainly in dispute. The Firms "offer-to-settle" letter was merely the Firm's opinions on the issues of liability and damage. An attorney's opinions set forth in the letter are certainly not evidence of liability or damage. The letter, including the opinions expressed therein, is an inadmissible offer to compromise, and certainly not evidence of loss, injury or expense.

The Florida rule is patterned after Fed.R.Evid. 408, so the cases interpreting the federal rule are instructive. In Ramada Development Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981), the court trial court refused to admit a report prepared by an architect employed by the plaintiff

"because the report was a tool in an unsuccessful settlement attempt. " 644 F.2d at 1106. The statements in the report were intended to be part of the negotiations toward compromise. The court stated the report came within the exclusionary scope of Rule 408 because the report, "would function as a basis of settlement negotiations regarding the alleged defects in the motel. The report was to identify arguable defects that could then be discussed in monetary terms in negotiations." Id. 644 F.2d at 1107, See Kritikos v. Palmer Johnson, Inc., 821 F.2d 418 (7th Cir. 1987) (a breach of contract suit wherein delay was one of the issues; the trial court admitted the contents of two letters from the plaintiff dealing with the causes of the delays in which the plaintiff acknowledged some responsibility for the delay; held the letters were improperly admitted in violation of Rule 408 because they arose from compromise negotiations and offers to compromise); New Burnham Prairie Homes Inc. v. Village of Burnham, 910 F.2d 1474 (7th Cir. 1990) **(trial court properly excluded, per Rule 408, a letter from defendant's attorney to plaintiff% attorney because it was part of a settlement attempt).** (emphasis added)

In summary, the Firm's letter was an offer-to-settle, or part of a settlement attempt. It was not *statement* within the meaning the statute. A *statement* is evidence or proof of loss or expense, such as a tape-recorded statement and bill of sale, etc. The negotiation rhetoric of an attorney that the tortfeasor was the sole cause of the accident, or his bombast that the value his client's claim is equal to the national debt, is not *a **statement*** within the statutory definition. An *initial* pre-suit "offer-to-settle" letter, which is not "evidence" or proof of anything, cannot be the basis of, or the underpinning of a violation of the statute.

The statute is unconstitutional in its entirety, because it violates equal protection.

The statute violates the Equal Protection Clauses of the Florida and United States Constitutions, because it makes arbitrary and discriminatory classifications between parties who are similarly situated with respect to insurance claims. It imposes a criminal penalty upon a claimant, a doctor, an attorney or a hospital for engaging in fraudulent conduct, but imposes no such sanction for fraudulent conduct by an insurance company. But, an insurance company is subject only to an action for civil damages if it commits fraud.

The equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). A violation of the equal protection clause may occur when a legislative body enacts a law which **'has a special impact on less than all the persons subject to its jurisdiction.. .'"** New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-88, 99 S.Ct. 1355, 1367, 59 L.Ed.2d 587 (1979). Yet, "the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. " Reed v. Reed, 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971). An equal protection analysis, therefore, requires as a "preliminary step" a determination of **"whether persons who are similarly situated are subject to disparate treatment."** Johnson v. Smith, 696 F.2d 1334, 1336 (11th Cir. 1983). (emphasis added)

Does § 817.234 give disparate treatment to similarly situated persons. The subsection question provides, "(t)he provisions of this section shall also apply as to any insurer or adjusting firm or its agents or representatives who, with intent, injure, defraud, or deceive any claimant with regard to any claim. **The claimant shall have the right to recover the damages provided**

in this section." § 817.234(7), Fla. Stat. (1993) (emphasis added)

The discriminatory treatment of a claimant, an attorney, a doctor or a hospital is clearly reflected in the language of the statute. The subsections applicable to a claimant, a doctor, an attorney or hospital expressly make a violation a felony offense. **However, the subsection applicable to an insurance company itnposes no criminal penalty.** The subsection is silent as to a criminal penalty, and merely states, **"The claimant shall have the right to recover the damages provided in this section."** In other words, an insurance adjuster may defraud a claimant, doctor or hospital, and only subject his employer and himself to civil monetary damages. (emphasis added)

Plus, the subsection prohibits only ***actual*** *fraud* by an insurance company. The insurance company must actually "injure, defraud, or deceive" a claimant. In contrast, the subsections applicable to a doctor or a hospital are much broader making *assisting, conspiring,* or *urging* an "insured party" to violate the statute a crime. An insurance company's adjuster may conspire to defraud a claimant to keep settlements low, but unless actual fraud is committed, the subsection is not violated. Finally, if actual fraud does occur the insurance carrier is only subject to money damages, not prosecution.

The State says the provision of the statute which reads, **"(t)he** provisions of this section shall also apply as **to** any insurer or adjusting firm or its agents or representatives who, with intent, injure, defraud, or deceive any claimant with regard to any claim, **"** saves the day. The State says this language makes the provisions and penalties set forth in subsections (l)-(4) and **(8)-(9)** also applicable to an insurance company. However, a close reading of these subsections shows the fallacy of this reasoning. None of the prohibited conduct can apply to an insurance

company.

Subsection (1) provides any person who, with the intent to injure, defraud, or deceive any insurance company presents any written statement as part of, or in support of, a claim for payment of benefits pursuant to an insurance policy knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim commits a crime. If the claimant gives the insurance company false or misleading information, or the claimant fails to disclose to the insurance company any statement material to the claim, the claim is fraudulent. Simply stated, an insurance company never seeks benefits. **An insurance company never submits information, false or otherwise, for the purpose of obtaining benefits. To the contrary, it is seeking not to pay benefits.** Subsection (1) only applies to a person seeking benefits, not to the person paying benefits (the insurance company). (emphasis added)

Subsection (2) concerns doctors assisting, conspiring, or urging insureds to commit insurance fraud. This subsection is restricted to conduct by doctors and insureds to unlawfully obtain insurance benefits. **The subsection is not applicable to an insurance company, because an insurance company would not conspire with a doctor and an insured to defraud itself.** Subsection (3) concerns an attorney assisting, conspiring, or urging a claimant to fraudulently obtain insurance benefits. Again, this subsection is restricted to conduct by an attorney and an insured. **An insurance company would never be assisting, conspiring with, or urging an attorney and a claimant to defraud itself.** Subsection (4) relates to a hospital, or its employees, allowing the hospital facilities to be used by an insured in furtherance of a scheme or conspiracy to fraudulently obtain insurance benefits. Again, this subsection is restricted to

the hospital, or its employees, facilitating a fraud by an insured. **An insurance company would not conspire with hospital employees and the insured to defraud itself.** Subsection (8) prohibits persons commonly referred to as "runners" from soliciting clients. **An insurance company would not solicit people to file claims against itself,** Lastly, subsection (9) makes it unlawful for an attorney to solicit clients, **An insurance company would not assist, conspire with, or urge an attorney to solicit clients to file claims against it.** (emphasis added)

Insurance companies do engage in fraudulent conduct to deny benefits. Consider, Sibley v. Adjustco. Inc. 573 So.2d 353 (Fla. 2nd DCA 1990), wherein Sibley suffered a heart attack as the result of unusual stress related to his employment as a truck driver. Following that event, he claimed workers compensation benefits. The workers' compensation insurance carrier used Adjustco to investigate his claim. Adjustco's investigator edited and altered Sibley's statement given to the investigator while he was hospitalized and sedated. Adjustco used the altered statement to deny Sibley benefits. He was forced to litigate his right to receive benefits. Sibley was eventually awarded benefits when the deputy commissioner found that Sibley's statement given to Adjustco's investigator was of no credible value and appeared to a large degree to have been edited by the interviewer and does not contain all of the facts and circumstances surrounding the occurrence of the heart attack. Consider, what portion of the statute makes this type of conduct by Adjustco's investigator a crime? None!

In conclusion, scrutiny of the statute reveals it does not impose criminal penalties on an insurance company. Given that the § 8 17.234 exempts an insurance company from criminal penalties, this Court must determine if the statute is rationally related to a legitimate state interest. While "the general rule is that legislation is presumed to be valid and will be sustained

if the classification drawn by the statute is rationally related to a legitimate state interest, " City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985), **if the varying treatment of different persons similarly situated is so unrelated to the achievement of any combination of legitimate purposes then the legislature's actions are irrational, and the statute is unconstitutional,** (emphasis added)

In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), a Louisiana workers' compensation statute denying death benefits to dependent, unacknowledged, and illegitimate children of deceased employees was challenged on equal protection grounds. The Supreme Court, applying the rational basis test, held that the statute violated the equal protection clause. The defendant insurance company had argued, among other things, that the statute was constitutional because it lessened the possible problems of locating illegitimate children and determining uncertain claims of parenthood. The Court reviewed that argument in light of the overall purpose of the Louisiana workers' compensation scheme and stated that while it "fully respect[ed] Louisiana's choice on [that] matter,. , .the inferior classification.. . [bore] no significant relationship to those recognized purposes of recovery [i.e., providing compensation to disabled employees and their families] which workmen's compensation statutes commendably serve." Id. at 174-75, 92 S. Ct. at 1406. The reasoning of Weber is applicable here. **If preventing insurance fraud is the goal of § 817.234, there is no rational justification for exempting an insurance company from the purview of the statute.** (emphasis added)

In Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985), car buyers who bought and registered their cars outside of Vermont before becoming Vermont residents

filed suit challenging, on equal protection grounds, Vermont's requirement that they pay a full use tax in order to register their cars in the state. Under the Vermont statutory scheme, the state collected a use tax when a car was registered with it but not if the car was purchased in Vermont and the buyer had paid a sales tax. The tax was reduced by the amount of any sales or use tax paid to another state if the state would afford a credit for taxes paid to Vermont in similar circumstances. The credit, however, was available only if the person registering the car was a Vermont resident at the time he paid the taxes. Id. at 15, 105 S.Ct. at 2468, Vermont argued, in part, that the statute was constitutional because it was consistent with the state's policy that those persons using the roads should pay for them, The Supreme Court disagreed: "This 'basic policy' arguably supports imposition of the use tax on [out-of-state car buyers], and the denial of a credit to them; but it provides no rational reason to spare Vermont residents an equal burden." Id. at 25-26, 105 S. Ct. at 2473. The reasoning of Williams is applicable here. **If punishing insurance fraud is the goal of § $17.234, there is no rational justification for attempting to accomplish that goal with an uneven hand by punishing only the insured or claimant, and not the insurer for engaging in fraudulent conduct.** (emphasis added)

In the recent case Iacovone v. State, 639 So.2d 1108 (Fla. 2nd DCA 1994), the court held § 784.07(3) and 775.0825, Fla. Stat. (1991), as applied, violate the Equal Protection Clause. Section 784.07(3) provided "...any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty or who is convicted of attempted murder of a law enforcement officer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer, shall be guilty of a life felony.. . " A conviction was punishable by a twenty-five (25) year minimum mandatory term. In contrast,

§ 775.0825 relating to murder in the third degree of a law enforcement officer, was punished much less severely, and carried a maximum and mandatory sentence of fifteen years' imprisonment,

The court recognized that persons charged with attempted third-degree murder of a law enforcement officer and those charged with the completed offense of third-degree murder are not similarly situated because they are charged with different offenses. See People v. Suazo, 867 P.2d 161 (Colo. Ct. App. 1993). **Nonetheless, the court reasoned that irrational classifications may violate fundamental constitutional principles if the prescribed penalties are not "rationally related to the recognized legislative objective of establishing 'more severe penalties for acts which it believes have greater social impact and more grave consequences.' "** 867 P.2d at 164 [quoting People v. Montoya, 196 Colo. 111, 582 P.2d 673, 675 (Colo. 1978)].

Compare, in this case, the legislative objective is to punish fraud in the insurance claims process. The prescribed penalties for committing insurance fraud are not rationally related to the legislative objective of preventing insurance fraud. It makes no sense to place criminal sanctions on fraud by an insured, but mere civil monetary sanctions on fraud by an insurer. Fraud by an insurer is no less grievous to the insurance claims process, than fraud by a claimant. In fact, fraud by an insurer may be more egregious because the claimant, not having the financial resources of the insurer, may not be able to fight the insurer's actions.

While the Florida Legislature had expressed a valid intention to provide law enforcement officers with the greatest protection possible because of their exposure to great risk of violence, the court was unable to conclude there was a rational basis for classifying an attempt to murder

more severely than a completed murder and in rewarding the completed murder with a lower sentence than the failed attempt. Likewise, there is no rational basis for punishing fraud by insureds, but not fraud by the insurer (insurance company).

Consider, in the case of a testamentary spendthrift trust created by a Will, a fiduciary relationship exist between the trustee and the beneficiary of the trust. Certainly, the trustee cannot spend trust funds for non-trust expenditures. Likewise, the beneficiary cannot create fictitious or false "necessary" expenditures to justify the receipt of trust proceeds. In each instance, the unlawful taking is a theft. In each instance the wrongdoer can be charged with theft. Yet, in the context of insurance, § 817.234(1) makes it a crime for an insured to fraudulently obtain benefits from his insurance company, but does not make it a crime for the insurance company to fraudulently withhold or deny benefits, which belong to the insured.

The following examples amplify the disparate treatment. Florida automobile insurance law requires an automobile insurance company to provide uninsured motorist coverage, unless the insured specifically executes a written waiver. An insured submits a false medical report to his insurer for the purpose of collecting uninsured motorist benefits. This constitutes insurance fraud. When the insurer receives the insured's notice of claim, it creates a false written waiver form, so it can deny uninsured motorist coverage and refuse to pay the claim The insured's conduct, (creating a false medical report) violates § 817.234(1), but the insurer's conduct (creating a false written waiver) does **not** violate any criminal provision of § 817.234.

Consider a second scenario. In Book v. State, supra, Book was successfully prosecuted for violating § 817.234(1) for making a false taped statement and submitting false documents regarding the purchase price of his stolen car. Book bought a "grey market" car which cost less

than a domestically purchased car. The car was stolen 3 weeks after it was purchased, so the purchase price was a key factor in determining the fair market value. Book falsely misrepresented the purchased price, so as to get a higher settlement, thereby violating the statute. What if the shoe was on the other foot? Suppose the insurance company intentionally misrepresented the "blue book" value in an attempt to get Book to settle his claim for less than the fair market value. A careful reading of § 817.234 reveals such conduct by the insurance company would not violate any of the criminal provisions of the statute,

Consider a third scenario. An insured is rear-ended by a driver (tortfeasor) who at the accident scene says he has no insurance and produces not proof of insurance. The insured files an uninsured motorist claim against his own insurance company, The adjuster denies the claim stating that the insured has not submitted sufficient proof that the tortfeasor has no insurance. The adjuster does so even though his own investigation reveals the tortfeasor has no insurance. Clearly, the adjuster's conduct is a fraudulent ***attempt*** to deny benefits, but the adjuster has not committed a criminal violation of § 8 17.234.

All the aforestated scenarios have one common theme. It is not a crime to fraudulently deny insurance benefits, It is only a crime to fraudulently obtain benefits. The ultimate goal of the statute is to facilitate the pre-suit settlement of insurance claims by punishing fraudulent conduct committed during the settlement process. There is simply no rational basis for criminalizing fraudulent conduct by an insured, but not an insurer. The language, "(t)he provisions of this section shall also apply as to any insurer.. .who, with intent, injure, defraud, or deceive any claimant with regard to any claim, " is meaningless because none of the subsections containing a criminal penalty apply to an insurance company.

While preventing insurance fraud is a laudable public purpose, imposing a criminal penalty on an insured or claimant, but not on an insurance company who commits fraud regarding insurance benefits is arbitrary and unreasonable.

§ 817.234(1) conflicts with the PIP statute

F. S. § 817.234(1) conflicts with the Florida No-Fault statute regarding personal injury protection benefits (PIP). F.S. 817.234(1) governs all types of insurance claims, including claims arising from motor vehicle accidents, and it requires a claimant to give its own insurance company all medical reports material to the claim. The PIP statute concerns only claims arising from motor vehicle accidents. The PIP carrier may compel that a claimant submit to a medical examination. § 627.736(7)(a), Fla. Stat. Concerning a claimant's obligation to give the PIP carrier all medical reports relating to the claim, the PIP statute has two conditions precedent governing disclosure. First, the insurance company must have the claimant undergo an examination by its doctor. Second, the claimant must request and receive a copy of the PIP carrier's doctor's report. § 627.736(7)(b), Fla. Stat.

A special statute covering a particular subject matter controls over a general statutory provision covering the same and other subjects in more general terms. The more narrowly-drawn statute operates as an exception to, or qualification of the general terms of the more comprehensive statute. State v. Brown, 530 So.2d 51 (Fla. 1988). The broad language of § 817.234(1) evinces the general intent of full disclosure of all material medical reports to the insurance company when an insurance claim is made; otherwise it is incomplete. In contrast, the PIP statute evinces the specific intent of restricting and regulating the disclosure of medical reports. The two statutes collide when a claimant has a combined PIP and UM claim. The

insurance company wears "two hats" - PIP insurer and UM insurer. If § 817.234(1) controls, the PIP statute is rendered moot in a combined PIP-UM claim, and the insurance company reaps a discovery windfall. By operation of § 817.234(1), it is entitled to receive all the claimant's medical reports, even though the PIP statute allows a claimant to withhold medical reports. The PIP statute obligates a claimant to disclose medical reports **only** if the claimant undergoes an insurance company mandated medical examine, **and** asks for and receives a copy of the report of that examine,

The statutes are harmonized by a ruling that in combination PIP-UM claims, the more narrowly-drawn PIP statute operates as an exception to § 817.234(1) and controls the dissemination of medical reports in combination PIP-UM claims.

The theft charges should be dismissed.

The theft charges are inseparably intertwined with the allegations of violating § 817.234(1). The State contends the Firm committed theft by fraudulent omission, to wit: violating § 817.234(1)'s duty to disclose any information material to an insurance claim. It is the Firm's purported breach of the duty to disclose created by § 817.234(1), which is the fraudulent omission that allegedly constitutes the theft by fraudulent omission. Both charges are inseparably intertwined, such if § 817.234(1) falls, in whole or in part, so do the theft charges.

Conclusion

A lawyer's pre-suit "offer-to-settle" letter is not a statement within the meaning of the statute. So, it cannot be deemed an *incomplete* statement within the meaning of the statute. In the alternative, the statute is unconstitutional in its entirety; so, all the insurance counts and the theft counts predicated upon a violation of the insurance statute must be dismissed. In the

alternative, the portion of the statute dealing with the submission of ***incomplete*** claims is unconstitutionally vague, and all the insurance counts and the theft counts predicated upon a violation of that portion of the insurance statute must be dismissed. Lastly, the Court must declare that in combination PIP and uninsured motorist claims that the PIP statute regulates the pre-suit disclosure of medical records to an insured's carrier. [18]

Endnotes

1. Pages 5-10 of the State's brief.

2. Marks v. Ferris, 4th DCA case nos. 93-867 and 93-1112.

3. Page 1 of State's brief, Predicate act T and count 22, and predicate act U of count 1 and count 23, case no. 90-6433CF10.

4. Joseph E. Gelety, Johanna Gelety, Lane, Gelety, Woolsey and Centrone P.A., the Center for Neurological Services, Inc., and CLG Inc. a/k/a CLG Neurodiagnostics.

5. The District Court affirmed the dismissal of three predicate acts of the Rico count, and three substantive counts (ie. State v. Marks, 596 So.2d 1074 (Fla. 4th DCA 1992).

Later, the State nolle prossed a grand theft count. The State, copying the Florida Bar, charged that the Firm committed grand theft by failing to remit to clients interest earned on settlement proceeds deposited in the Firm's interest bearing trust account. This allegation concerned deposits into the trust account in 1987, before the interest on trust accounts program (IOTA) was mandatory. The allegation is best explained by using client Ellen Stewart's case as an example. When the Firm received her insurance settlement draft, it was deposited in the Firm's interest bearing trust account. On the ninth business day after the draft was deposited, the funds began accruing interest. The Firm disbursed Stewart the funds due her from the settlement on the tenth business day after deposit, but did not pay Stewart the one day's interest earned on the funds.

The Firm challenged that the State's theory ignored:

(1) That as a matter of law a client has no property right to nominal interest earned on a short term deposit of funds in an attorney's trust account.

(2) That the Firm's trust account consisted of two sections, an interest bearing money market account and a non-interest bearing checking account from which clients received their money.

(3) That the Firm "prefunded" Stewart's settlement by transferring its own funds for disbursement to Stewart from the interest bearing money market account to the non-interest bearing checking account before Stewart's draft earned interest in compliance with the Florida Bar trust account rule, which provides for the "prefunding" and disbursal of "limited-risk uncollected funds" (insurance drafts) from a law firm's own funds. The Firm held a pool of its own money in the account to fund clients' settlements. By prefunding the settlements with its own money, the Firm lost interest it could have earned on its own money.

(4) That at the time of the banking transactions related to Stewart's settlement, there was uncertainty as to the date insurance company drafts/checks became "collected" funds because there were no banking regulations that limited the length of time a bank was permitted to delay the availability of deposits of drafts/checks. The Firm's "prefunding" procedure benefitted its clients by allowing them to receive their net settlement even if the insurance draft/check was not "collected" funds.

(5) That the client is not entitled to receive nominal interest earned on a short-term deposit, because the trustee-lawyer is entitled to reimbursement for costs necessarily incurred to safeguard and administer the trust account; thus, the client is only entitled to the "net" income after the deduction of expenses.

In April 1992, this Court ordered the Bar to conduct a hearing on the allegation of theft interest earned on clients' trust funds, Marks presented the above arguments to the Bar. The Bar abandoned the charge and agreed not to oppose his reinstatement to the practice of law. Thereafter, the State also dropped the charge.

The Firm was charged with grand theft from Jackson Memorial Hospital concerning the settlement of Emma Johnson's personal injury claim against Jackson Memorial Hospital. After pretrial discovery revealed the hospital saved money by negotiating the settlement in the manner in which it did, the State nolle prossed the predicate act and substantive count.

The Firm was charged with violating the statute concerning Jesse Wilcher's personal injury claim. The State charged that the Firm presented a "false" medical report of Dr. Dwight Reynolds to the tortfeasor's insurance company. To the embarrassment of Dr. Reynolds, pretrial discovery revealed the purportedly "false" report was true and correct. **The doctor, himself, had altered his own records to cover the fact he improperly solicited a patient for his private practice while on duty at Broward General Medical Center. The** State nolle prossed the charges.

6. R. Regulating Fla. **Bar** 4-1.6 and § 90.502, Fla. Stat.

7. The charge also includes an allegation, the Firm submitted a false medical report of Bernard Cohen, D.O. Concerning the allegation the Firm submitted a "false" medical report, seventy-four year old Dr. Cohen asserts the report, in his own file, was not authored, approved, or adopted by him. There is conflicting testimony. Dr. Cohen's own medical transcriber says she typed the report from Dr. Cohen's audio tape; afterwards, she sent it to Dr. Cohen's office where his signature stamp was affixed; and she does not know Mark Marks. (R. 1222-1223)

Attorney Laurence Leavy , not a defendant, prepared a proposed draft of the report. His proposed report contained more complete and accurate information than Dr. Cohen's earlier report. Leavy's draft was a compilation of Dr. Cohen's earlier report, his physician's notes, plus the observations and opinions of other doctors' reports in Dr. Cohen's file. Later, Dr. Cohen told Leavy he had approved and signed the report. (R. 1220-1221) Dr. Cohen acknowledges the report is more accurate and more complete than his earlier report. (R. 1228)

The jury is going to have to decide whether it believes Leavy and the medical transcriber, or Dr. Cohen Dr. Cohen's "credibility" is a key issue. Dr. Cohen told the undersigned that after reading his medical transcriber's deposition, he may have been mistaken in his earlier belief his office did not prepare the report. He said his memory is not as good as it once was and that the medical transcriber probably did type the report. At a subsequent deposition, he contradicted himself. (R. 1704-1705)

Besides making inconsistent statements, Dr. Cohen is impeachable on other grounds. Dr. Cohen plead nolo contendere to sexually assaulting one of the Firm's clients. He admits the sexual conduct, but said it was therapeutic because he was trying to show her how to experience an organism. Dr. Cohen blames Mark Marks for the client pursuing the charges. He is angry about pleading to a serious charge, losing his medical license, and being on probation. (R. 1705-1706) (emphasis added)

8. Dr. Kagan opined: IMPRESSION: Abnormal NMR scan of the lumbosacral spine - progression. 1. Posterocentral and bilateral focal protrusion L5-S1 disc - intradiscal herniation. 2. Diffuse posterior bulging of the annulus W-5 disc unchanged. 3. Normal spinal cord and lumbar canal - unchanged.. . (emphasis added)

Dr. Howard R. Wilkov, a respected radiologist associated with Holy Cross Hospital, opined, "(t)here is a small prolapsed central disc herniation at L5-S1. The off center slices on both sides indicates that there arc small extruded bilateral disc herniations at this L5-S1 disc level."

9. The suit has since been settled by The Miami Herald paying an undisclosed amount of damages.

10. This investigation was the investigator's first insurance investigation Prior to this investigation, he was a road patrol officer with a municipal police department with no experience in insurance or personal injury law.

11. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct 385, 91 L.Ed. 451 (1947); Fla.R.Civ.P. 1.280(b)(3); Fla.R.Crim.P. 3.220(g)(1); Florida Statute 90.502; and R. Regulating Fla. Bar 4-1.6.

13. (1) Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining or denying any benefit or payment under this chapter: (a) Who presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false or misleading information concerning any fact or thing material to such claim; (§ 440.37, Fla. Stat.)

14. § 72.40(2)(a), Fla. Stat., provided, "(2) It shall be unlawful for any person:. . .(a) Rendering any service in connection with the placement of a child for adoption, or in connection with the placement of a child with one other than its parents, to charge or receive from or on behalf of either the natural parent or parents of the child to be adopted or placed, or from or on behalf of the person or persons legally adopting, or accepting, such child any compensation or thing of value whatsoever for the placement service, other than that now or hereafter allowed by law; but this shall not be construed to prohibit the payment by any interested persons of reasonable charges or fees for hospital or medical services, for the birth of a child or medical care for the mother or child incident thereto, or for legal services, or costs of court for an adoption suit or proceeding. "

15. § 415.503(7)(f) and § 415.511, Fla. Stat.

16. Florida Practice Guide: Personal Injury, Callaghan & Company, Deerfield, Michigan, p. 4-15, 4-16.

17. § 409.325, Fla. Stat. (1977)

18. § 409.325(1)(b), Fla. Stat. (1977)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 1995, a copy of the foregoing was provided by U.S. mail, and/or hand delivered, and/or by facsimile, to:

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APPENDIX INDEX

Appendix A

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MARK MARKS, P.A., et. al.,

Defendants,

CASE NO. 90-6433CF10-J

ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION

THIS CAUSE came before the Court for consideration of Defendants, Mark Marks P.A.'s Motion for Reconsideration filed July 9, 1993, Defendant, Gary Mark's Motion for Reconsideration of Prior Factual or Legal Rulings by Disqualified Judge filed July 9, 1993, and his Supplemental Motion for Reconsideration filed July 26, 1993. Upon review of this motion, this Court elected to re-examine the issues raised by the Motion Challenging Constitutionality of F.S. § 817.234. This Court having considered this motion, the submitted memoranda of law, the argument of counsel, the applicable law, and being otherwise -- fully advised, finds as follows:

The instant case has been handled by numerous judges and undergone several transformations. Merely sifting through the voluminous file in an attempt to answer even the most basic questions is a formidable task. The State initially filed its information in this case on December 20, 1989. The State refiled the information in March of 1990 and then amended it on August 21, 1991. This amended information contains 35 counts of which only 27 remain pending.

Generally, the amended information charges various defendants with engaging in illegal activities to enhance the settlement value of insurance claims. The amended information is filed against six Defendants: Marvin Mark Marks, Gary Marks, Mark Marks, P.A., Ronald Centrone, Carl Borgan, Irene Raddatz aka Irene Porter for violations of the RICO statute, conspiracy to engage in racketeering, organized scheme to defraud, and various counts of grand theft and insurance fraud. The State also brought charges against Denise Beloff and Noreen Roberts in Count 2 for conspiracy to engage in racketeering and in Count 3 for organized scheme to defraud.

The gravamen of the counts against the Defendants involve the alleged violation of the False and Fraudulent Insurance Claims statute, F.S. § 817.234. In Counts 19, 21, 31, 32, and 35, which are also Count l's predicate acts Q, S, CC, DD, and GG, respectively the State charges the Defendants with violating F.S. § 817.234(1)(a)(1). In Count 33 and predicate act EE, the State charges the Defendants with violating F.S. § 817.234(1)(a)(2) by preparing a medical report reportedly written by Dr. Centrone but dictated by Mark Marks. Florida Statutes § 817.234(1)(a) states:

> (l)(a) Any person who, with the intent to injure, defraud, or deceive any insurance company, including, but not limited to, any statutorily created underwriting association or pool of insurers or any motor vehicle, life, disability, credit life, credit, casualty, surety, workers' compensation, title, premium finance, reinsurance, fraternal benefit, or home or automobile warranty company:
>
> 1. Presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an insurance

policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim; or

2. Prepares or **makes any** written or oral statement that is intended to **be** presented to any insurance company in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete or misleading information concerning any fact or thing material to such claim,

The State attempts to apply **F.S. § 817.234(1)(a)** to the use of a demand letter **by** an injured party's attorney. The State concedes that a demand letter is not a claim. However, the State incorporates a demand letter within the **statute's** definition of "statement" which provides:

"statement" includes, **but** is not limited to, any notice, statement, proof of loss, bill of lading, invoice, account, estimate of property damages, bill **for** services, diagnosis, prescription, hospital or doctor records, X-ray, test result, or other evidence of loss, injury or expense.

The State asserts that a demand letter constitutes a written statement in support of a claim. Consequently, the State claims that by submitting a demand letter and intentionally excluding medical reports or, alternatively, attaching fraudulent medical reports, the attorneys in this case violated this statute.

Additionally, the State charges the attorney Defendants with violating F.S. **§ 817.234(3)** in Counts 15, 22, and 23, which are predicate acts **M**, T and **U**, respectively. Florida Statutes **§ 817.234(3)** states:

Any attorney who knowingly and willfully assists, conspires with, or urges any claimant to fraudulently violate any of the provisions of this section or part XI of chapter 627, or **any person** who, due to such assistance, conspiracy, **or urging on** such **attorney's**

part, knowingly and willfully benefits from the proceeds derived from the use of such fraud, is guilty of a felony of the third degree ...

Defendants' contend that F.S. § 817.234 suffers from the constitutional infirmities of vagueness and overbreadth. They insist that both the term "incomplete" and the term "statement", can proscribe practically any conduct, and therefore, the statute fails to give attorneys fair warning and risks arbitrary and discriminatory enforcement. Additionally, the Defendants assert that F.S. § 817.234(1)(a) applies only to first party claimants. The Defendants also maintain that an attorney's demand letter is not a "statement." Finally, the Defendants contend that the statute establishes classifications which are arbitrary and, therefore, violate equal protection.

The State rebuts this contention by maintaining that the scienter requirement cures whatever vagueness may admittedly be present in the statute. Furthermore, the State claims that the Court must effectuate the clear intent of the legislature to expand the scope of the statute to any person, including attorneys.

The vagueness doctrine emerged out of an effort to assure compliance with due process.[1] Wyche v. State, 619 So.2d 231 (Fla. 1993); S.E. Fisheries v. Dept. of Nat. Resources, 453 So.2d

[1] This court declines to address the issue of overbreadth raised by the Defendants. As the Florida Supreme Court has reiterated: "the overbreadth doctrine applies only if the legislation is susceptible to conduct protected by the First Amendment." Wyche v. State, 619 So.2d 231 (Fla. 1993) citing Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984).

1351 (Fla. 1984). The vagueness doctrine addresses two due process concerns: adequate notice and arbitrary and discriminatory enforcement. Id. If a penal statute does not give a person of common intelligence a reasonable opportunity to know what conduct it prohibits, the statute violates due process rights,? Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); State v. Wershow, 343 So.2d 605 (Fla. 1977); Bertens v. Stewart, 453 So.2d 92 (Fla. 2d DCA 1984). In evaluating a statute under the void for vagueness doctrine, a court must undertake a contextual analysis ascertaining "whether or not the party to whom the law applies has fair notice of what is prohibited. " S.E. Fisheries at 1354.

In the case at bar, the State's application of this statute casts personal injury attorneys as the parties to whom this statute is directed. This Court has grave doubts that F.S. § 817.234(1)(a) as applied by the State in this case would apprise any personal injury attorney that submitting a demand letter on behalf of an injured party would subject the attorney to the __ punishment of this statute. While this Court agrees that the all-inclusive definition of the term "statement" may render the statute vague, the more significant source of vagueness lies in the term "person." A personal injury attorney, familiar with the insurance code would not interpret the term "person" to include attorneys of injured third parties. Consequently, the attorney would not perceive that any conduct on his/her part could violate F.S. 817.234(1).

An analysis of the statute's structure coupled with a review of statutes relating to the same subject matter, namely, the insurance code, evince a legislative intent that this statute apply solely to first-party insureds. In statutory construction, legislative intent is the pole star by which a court must be guided,, Lee v. Gaddy, 183 So. 4 (Fla. 1938) citing State v. Sullivan, 95 Fla. 191, 116 So. 255, 261. A court should not give a literal interpretation that leads either to unreasonable conclusions or a purpose not contemplated by the legislature. State v. Miller, 468 So.2d 1051 (Fla. 4th DCA 1985).

The composition of F.S. § 817.234(1) itself suggests that it was not meant to apply to third-party liability cases. As the Defendants correctly indicate subsection (1) contains two parts which must be read with reference to each other to glean the proper meaning of the provision as a whole. By framing these parts within the same subsection instead of making them separate provisions, the legislature manifested an intent for these parts to be read in harmony with one another, not in isolation. While part (a) of subsection (1) begins with the term "any person," part (b) states "All claims forms shall contain a statement in a form approved by the Department of insurance." This subsection must exclude third parties because claim forms exist only for first party insurance claims.

An examination of the remaining subsections of the statute reinforces this construction. As the Defendants correctly note, subsections (2) and (4), applicable to doctors and hospitals,

respectively, are limited to assisting, conspiring, or urging an insured party to fraudulently violate the statute. While subsection (3) employs the word "claimant," it must also refer to insured parties, as it seeks to penalize the same type of conduct punishable in subsection (2) and (4). Interpreting "claimant" to mean anything other than "insured party" would result in a framework in which only the attorney is susceptible to punishment when urging fraud on the part of a third party while the doctor and hospital could only be prosecuted when urging a first party insured. Moreover, the statute's reference to a violation of the No-Fault Act further supports this construction because that Act also applies only to first-party claims.

Furthermore, the legislature did not intend for 817.234 to be read in a vacuum but rather that it be viewed in the context of the insurance code. This statute first appeared as part of an act relating to liability and insurance in Chapter 76-266 of the Laws of Florida. The following year the legislature amended the statute when it passed "The Florida Insurance and Tort Reform-Act of 1977." The legislature renumbered the statute in 1979 again declaring it an act relating to insurance. This continued legislative pronouncement of the statute as part of an act relating to insurance evidences the legislature's intent that it derive its meaning from the insurance code.

While many provisions of the code assist in construing this statute,' it is the nonjoinder of insurers statute, currently F.S. 627.4136, which has the dispositive impact on its meaning. Only

upon a review of the evolution of the nonjoinder statute can we comprehend how 817.234 applies only to insureds.

The initial statute and its various revisions grew out of tort reform. Originally, the common law in Florida as in other states prevented the joinder of insurance companies in lawsuits, by an injured party against an alleged tortfeasor. Generally, insurance contracts included no direct action clauses which the courts upheld as valid. See Appleman, Ins. Law and Practice § 4853. However, in Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), the Florida Supreme Court allowed third parties to sue the insurance companies of the alleged tortfeasor directly. The Supreme Court concluded that the insurers were the real parties in interest in these cases and that the injured party was a third party beneficiary of the contract between the insured and the insurer. With this finding, the Florida Supreme Court departed from the common law approach which gave validity to no-action clauses universally contained in insurance contracts. While some states had abandoned the common law view through legislative enactments, Florida's approach was unique in that the law was judicially altered.

Public Law 76-266 comprised the initial legislative response to Shingleton. However, the Florida Supreme Court held that by its terms the new non-joinder statute violated the separation of powers clause of the Florida Constitution by intruding on the rulemaking power of the Supreme Court over procedural matters, i.e., the joinder of parties. Markert v. Johnson, 367 So.2d 1003

(Fla. 1979).

Consequently, in 1982, the legislature redrafted the nonjoinder statute and this amended statute, tested in VanBibber v. Hartford Acc. & Indem. Ins. Co., 439 So.2d 880 (Fla. 1983), withstood constitutional attack. In VanBibber, the Court acknowledged that the legislature modified the third-party beneficiary concept set forth in Shingleton by proclaiming that injured parties held no rights in an insured's liability policy until a judgment was obtained in an action against the insured. Unlike the prior enactment, the amended statute affected a party's substantive rights and was not merely a procedural statute. Accordingly, the language of this statute did not invade the province of the judiciary.

The nonjoinder statute plays a vital role in understanding why the insurance fraud statute cannot apply to third parties. In its current form, the nonjoinder statute declares:

> No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third-party beneficiary or otherwise, prior to first obtaining a settlement or verdict against a person who is an insured under the terms of the policy for a cause of action which is covered by such policy.

§ 627.4136, Fla, Stat. (1992).

This portion of the statute governs the meaning of "any person" in F.S. § 817.234(1) and claimant in F.S. § 817.234(3). The nonjoinder statute divests any party other than the insured of any interest in a liability insurance policy. No third-party has any interest in an insurance policy until which time such

third party has obtained a settlement or verdict against the insured. Since the third-party possesses no interest in the policy, there can be no claim for payment under the policy by the third-party. Accordingly, the term "any person" in subsection 1 and "claimant" in subsection 3 can and should be construed as "any insured" as only the insured possesses an interest so only the insured can make a claim.[2] Moreover, the statute itself circumscribes the meaning of "claim" in defining it as "a claim for payment or other benefit pursuant to an insurance policy." § 817.234(1), Fla. Stat. So, a third party demand letter could never satisfy this definition of claim because when it is

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[2] The Florida nonjoinder statute evolved from the unique set of circumstances previously discussed. In California, for example, a type of nonjoinder statute exists as § 11580 entitled "Required policy provisions." This statute states in pertinent part:

> A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this state unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein.
>
> (b) Such policy shall not be thus issued or delivered to any person in this state unless it contains all the following provisions:
>
> (2) A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.

Unlike Florida, California recognizes third party rights which are contingent upon obtaining a judgment against the insured. Therefore, the case law in California interpreting either their nonjoinder statute and/or their version of the insurance fraud statute cannot be utilized to construe the Florida statute.

submitted no interest exists.

To this date, no appellate cases within Florida have dealt with the constitutionality of the False and Fraudulent Insurance Claims Statute.[3] However, several cases illustrate the impact of the Nonjoinder of Insurers statute and how the State's application of F.S. § 817.234(1) to the attorneys of injured third parties makks the statute impermissibly vague.

The Fourth District Court of Appeal addressed the effect of the Nonjoinder of Insurers statute on F.S. § 627.7264 and § 624.155 in Lucente v. State Farm, 591 So.2d 1126 (Fla. 4th DCA 1992). In Lucente an injured third party filed suit against an insurance company as a result of the company's repeated failure to respond to his requests for verification of the insured's liability coverage. The Court read both statutes in pari materia with F.S. § 627.7262 and concluded that the statute deprived-the plaintiff of standing to sue the insurance company until he obtained a judgment against the insured.

In the opinion of Cardenas v. Miami-Dade Yellow Cab Co., 538 So.2d 491 (Fla. 3d DCA 1989), Court confronted the issue of whether F.S. § 624.155 created a direct cause of action by an injured third party against an alleged tortfeasor's insurer who fails to settle in good faith. Florida Statutes § 624.155 provides in relevant part:

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[3] In fact, a survey of similar insurance fraud statutes throughout the country reveals several states which have statutes with almost identical language. However, none of these states nave been confronted with constitutional challenges.

(1) Any person may bring a civil action against an insurer when such person is damaged:
(a) By a violation of any of the following provisions by the insurer:
1. Section 626.954(1)(i) ....
(b) By the commission of any of the following acts by the insurer:
1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests; . . .

§ 624.155(1), Fla. Stat, (1987). Despite the use of the term "any person," the Cardenas Court held that the statute did not create a direct third-party cause of action. In arriving at this decision, the Court observed that the legislature is presumed to know the law at the time of the statute's enactment. Cardenas at 496; Opperman v. Nationwide Mut. Fire Ins., 515 So.2d 263 (Fla. 5th DCA 1987); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984). The Court further stated that upon "careful reading" of statute and those other statutes referred within it the Court found repeated references to the rights of first party insureds. Cardenas at 496. The Court concluded that the term "any person" had to be defined as any insured party; any other construction would be lead to an unreasonable result. Id.

The effect of nonjoinder was also evident in Aspen v. Bayless, 552 So.2d 298 (Fla. 2d 1989). The Second District Court of Appeals in Aspen felt constrained in holding that an insurance company is effectively barred from recovering costs it expends on the part of the insured. The Court reasoned that even though the plaintiff recovered less than defendant's offer of judgment the defendant was not entitled to costs because the offer of judgment

statutes assume the costs have been incurred by parties. As the nonjoinder of insurers statute provided that insurance companies are not considered parties until judgment is obtained by the injured party, no award of costs to the insurance carrier could be made. Id at 300.[4]

The case of State v. Book, 523 So.2d 636 (Fla. 3d DCA 1988) is also germane to our discussion. In Book, the State charged the Defendant with violating the False and Fraudulent Insurance Claims statute through oral statements made on a telephonic call to the insurance company. In determining that the proof of loss, while not a claim, was filed in support of a claim, the Court stated "Clearly, the intent of the Legislature in enacting P.S. § 817.234 was to make the filing of a false or fraudulent insurance claim a crime." Id at 638 (emphasis added). The State's argument discussing the relevance of the Book case misses the mark. The significance of Book is not that it dispenses with the formality of the claims process but instead that it emphasizes that a claim must be a prerequisite to violation of F.S. § 817.234.

These cases support the notion that third party plaintiffs have no rights under the policy of liability insurance or against the insurer until judgment is entered and, further, that to invoke the sanctions of F.S. § 817.234 the perpetrator must first file a claim or other statement in support of a claim. The oases suggest that the legislature did not intend to deviate from this

[4] Since the decision in Aspen, the Florida legislature has revised the nonjoinder of insurers statute to allow for recovery of costs in this type of situation.

course in the language of the False and Fraudulent Insurance Claims statute.

Construing F.S. § 817.234 to pertain only to first parties, is also consistent with other sections of the insurance code. Florida Statutes § 626.989, which defines "fraudulent insurance, acts, "when read in pari materia with F.S. § 817.234 further bolsters the contention that legislature did not intend to include third parties within the term "any person." Florida Statutes § 626.989 reads in pertinent part:

> (1) For the purposes of this section, a person commits a "fraudulent insurance act" if he knowingly and with intent to defraud presents, causes to be presented, to or by an insurer, purported insurer, broker, or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of, an insurance policy for commercial insurance or a claim for payment or other benefit pursuant to an insurance policy for commercial or personal insurance, which he knows to contain materially false information concerning any fact material thereto.

§ 626.989, Fla.Stat. (1989) (emphasis added). Again, the statutory language presumes a claim pursuant to an insurance policy, a claim which does not accrue in the third party context until a settlement or verdict is obtained. To lend further credence to the interrelationship of these sections, other sections of F.S. § 626.989 refer specifically to F.S. § 817.234.

In its memorandum, the State refers the Court to F.S. § 627.7264 in discussing the common practice of insurance companies and personal injury attorneys. This statute is particularly instructive to our discussion. In addressing the insurance companies responsibilities to the injured party, the statute

states in relevant part:

> (1) Each insurer which does or may provide liability insurance coverage to pay all or a portion of any claim which might be made shall provide, **within 30 days of the** written **request of the claimant . . .**

§ 627.7264, Fla. Stat. (1991). This section recognizes that when the law firm in a negligence action notifies the insurance company of its representation of the injured party against the insured **no** claim yet exists. At this point, there is no claim because of the effect of the non-joinder statute. Moreover, this statute exemplifies the clarity necessary to put third parties on notice.

In **summary,** the composition and structure of the F.S. **§ 817.234, the** case law interpreting the impact of the nonjoinder statute, and other sections of the insurance code read in pari materia with False and Fraudulent Insurance Claims statute coalesce to compel a construction which excludes third parties. At the very least, interpreting **F.S. §** 817.234 to incorporate third parties would create **vagueness** because the statute would fail to notify those parties subject to it of the illegality of their **conduct.**

Assuming **arquendo that the** statute does embrace injured third party plaintiffs, the statute would so eviscerate the settled and established practice of personal injury law that it would be unconstitutional due to is failure to provide notice, A change of this magnitude would require more notice to attorneys that their actions which heretofore were both legal and to some extent encouraged may be subject to sanction through this

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statute.[5]

The State's response to the constitutional attack on the statute relies heavily on the theory that even if vague, the scienter language saves the statute. The State focuses on both the language in F.S. § 817.234(1) which requires "the intent to, injure,, defraud, or deceive any insurance company" and in F.S. § 817.234(a)(1) and requires the statement be made "knowing that such statement contains . . . false, incomplete, or misleading information.. ." The State contends that element of specific

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[5] The Defendants cite extensively to taped courses conducted by the Florida Bar and to legal treatises. These excerpts reveal that custom and practice regarding pre-suit investigation and settlement of personal injury claims requires the attorney to emphasize the strengths of his case and not disclose the weaknesses. The Defendants quote the Florida Bar's Continuing Legal Education Audio-cassette, Basic Personal Injury 1989 (course number 6471, Taped 2/7 - 2/8/89, Tape III of V) as follows:

> "Um, that scared me a little bit as to how I was going to handle that because for some reason impairment ratings are still real critical to insurance carriers in evaluations.
> So I decided to work around that shortcoming through the preparation of a pretty extensive settlement brochure which I did. It ended up being about a 25-page letter with about 2 inches worth of exhibits and about 20 different exhibits and photographs and everything else in the world that you could thing of except reference to the impairment rating. And that case settled, I had serendipity, I mean it just, it went great and nobody ever asked the question. Um, you know there's no crime aqainst that.

Among the legal scholars and treatises mentioned by the Defendants, they cite to Florida Practice Guide: Personal Injury, Callaghan & Company, Deerfied Michigan, p. 4-15, 4-16. This guide, which was co-authored by United States District Court Judge William Hoeveler, advises lawyers to make selective disclosures or medical information during presuit negotiations, Certainly, if the statute is read to include personal injury attorneys representing third parties, then it appears that the Florida Bar has been cast in the role of Fagin teaching the artful dodgers in Oliver Twist.

criminal intent is virtually dispositive of any claim that a statute is void for vagueness,

The State cites numerous cases in supporting its contention that scienter eludes any attack on a statute due to vagueness. Village of Hoffman Estates v. Flipside, Hoffman Est., 455 U.S. 489 (1982); Papachristou v. Jacksonville, 405 U.S. 156 (1972); Boyce Motor Lines v. United States, 342 U.S. 337 (1971); State v. Joyce, 361 So.2d 406 (Fla. 1978). But, even some of the State's own cases do not take such an absolutist position. In Village of Hoffman Estates, for example, the Court states that it "has recognized that a scienter requirement may mitigate a law's vagueness." Id at 499 (emphasis added). Also, in State v. Joyce, the Court remarked that "the United States Supreme Court has often upheld a statute claimed to be unconstitutionally vague because scienter was an element of the offense." Id at 407 (emphasis added). In fact, there have been instances where the Florida Supreme Court has declared statutes unconstitutionally vague despite the presence of a specific intent element. State v. DeLeo, 356 So.2d 306 (Fla. 1978); State v. Barguet, 262 So.2d 431 (Fla. 1972).[6]

In the case sub judice, the scienter language does not rectify the statute's vagueness because it is not directed at the source of that vagueness. An analysis of precisely those cases

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[6] There is some dispute between the parties, as to whether State v. Rou, 366 So.2d 385 (Fla. 1978) involved a specific intent statute. However, the Defendants are not alone in their interpretation of Rou. See 33 U.M Law Review 955 (1979).

which the State refers to in its memorandum reveals that scienter ordinarily saves a statute from a vagueness challenge because it undercuts the notion that the accused was unaware the act violated the law. Scienter does not cure the vagueness problem in the instant case because it is not the conduct which is ambiguous. Instead, the ambiguity lies in whether the legislature meant to include third parties or alternatively, whether it is reasonable in liqht of the statute's language that third party attorney's would know that they are to be included within the its scope. None of the State's cases deal with this problem and the scienter language on which the State relies does not resolve this issue.

The State assails the interpretation of the F.S. § 817.234 which excludes third parties by arguing that the legislature intended to include all persons within its scope. The State, quotes the prior enactment of the statute which read:

> (1) Any insured party or insurer or insurance adjuster who, with intent, knowingly and willfully conspires to fraudulently violate any of the provisions of this part or who, due to fraud on such person's part, does knowingly and willfully violate any of the provisions of this part is guilty of a felony of the third degree . . .

§ 627.7375, Fla. Stat. (1976 Supp) (emphasis added). The State insists that the revision to any person reveals an intent on the part of the legislature to broaden the scope and include third parties. The State further supports its argument by pointing-rto the legislative staff analysis of Committee Substitute for the Senate Bill which provides that the rewritten section is

"expanded to all persons involved in the auto claims process."

While it is clear that the legislature sought to broaden the scope of the insurance fraud statute, it does not necessarily follow that it intended to reach third parties. The legislature revised the insurance fraud statute in the same bill in which it enacted the nonjoinder statute. Chapter 77-468, Laws of Florida. Statutes in different acts on the same subject matter passed at the same session are presumed to be imbued by the same spirit and actuated by the same policy and, therefore, a court must construe them each in light of the other, State ex rel. School Board of Martin County v. Department of Education, 317 So.2d 68 (Fla. 1975) ; Florida Police Benevolent Ass'n, Inc. v. Florida Department of Agriculture and Consumer Services, 557 So.2d 146 (Fla. 1st DCA 1990). The statutes at bar were passed within the same act creating an even stronger presumption that these statutes must be read in harmony. Moreover, the legislature could have meant to expand the statute to include executors or administrators of estates which were not incorporated within the prior text.

Finally, the State insists that the argument that no claim exists amounts to a technical distinction as the real parties in interest are the insurance companies. If this Court accepted the State's argument, it would be following precisely the reasoning of Shingleton v. Bussey which was overruled by the passage of the nonjoinder statute. This Court finds the New York case of People v. Learman, 121 N.Y.S. 388 (N.Y. 1953) particularly instructive

on this point. In that case, the New York Court was confronted with a penal statute dealing with false or fraudulent claims which contained similar language to that found in F.S. § 817.234: "in support of a claim upon policy of insurance." Our sister court explained:

> The claim which Melchoirre [the injured third party plaintiff] was endeavoring to establish was not a claim for a loss upon any contract of insurance. It was a claim in tort for damages against Pellicci [the insured defendant) arising out of his supposed liability on account of the non-existent accident, The fact that Pellicci was insured and that the insurance company stood in his shoes and was to be the intended victim does not render Melchoirre's claim a "loss upon a contract of insurance." These words as used in section 1202 relate as we view it to a situation when an insured or someone having a right to be paid for a loss under the terms of a policy makes a claim against the insurance company based upon the contract of insurance.

Consequently,, this Court concludes based on the aforementioned reasons that the False and Fraudulent Insurance Claims statute must be read in pari materia with the insurance code as a whole and the nonjoinder statute in particular. Therefore, the legislature did not intend to include injured parties suing insureds under a liability insurance policy within the meaning of "person" in the statute. Any other reading would render the statute vague for failure to notify those subject to its penalties. Accordingly, the Counts and predicate acts which involve third party claims are hereby dismissed.

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss based on the Constitutionality of F.S. § 817.234 is granted and Counts 15, 18, 19, 22, 23, 29, 30, 31, 32, 33, 34, and 35 and

predicate acts M, P, Q, T, U, AA, BB, CC, DD, EE, FF, and GG are DISMISSED.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 14 day of ~~September~~ October, 1993.

ROBERT LANCE ANDREWS
CIRCUIT COURT JUDGE

Copies furnished to:
counsel of record

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attorney's fees in its award if it does not find that all of the fees were reasonable and necessary. See § 61.16, Fla. Stat. (19[illegible] *Wrona v. Wrona*, 592 So. 2d 694 (Fla. 2d DCA 1991). However, once determining that the fees awarded were reasonable and necessary, the trial court should not have required the wife to pay a percentage of those fees, considering the significant difference between the husband and the wife in their present and future earning abilities and present assets.

Lastly, the trial court erred in awarding only $135.48 in costs listed in a supplemental affidavit, neglecting to award any expert fees and omitting such basic items as the filing fee. While the award of costs is within the trial court's discretion, the cost award here does not appear to be the product of an exercise of discretion. Because of confusion as to whether the previously filed original affidavit had reached the court file, the trial court may have overlooked certain items of costs and expert fees, specifically, those set forth in the original affidavit.

Accordingly, we reverse that portion of the attorney's fee award requiring the wife to pay $3,0[illegible] and we reverse and remand the award for recalculation of reasonable costs and expert fees for which the husband shall be responsible. Further, consistent with this opinion, we reverse the amended final judgment and remand with order that the trial court include valuation of the business' goodwill and to recalculate the parties' respective interests in the condominium, giving proper credit for the husband's separate contribution. In all other respects, the amended final judgment is affirmed.

AFFIRMED IN PART; REVERSED IN PART. (STONE, J., and BROWN, LUCY, Associate Judge, concur.)

* * *

Criminal law—False and fraudulent insurance claims—Prosecutions against attorneys who allegedly sent demand letters to insurance companies which omitted medical records or statements that would not be favorable to their claims-Portion of statute proscribing the submission of "incomplete" insurance claim is unconstitutionally vague as applied to attorneys in the representation of their clients as it does not provide adequate notice when omissions will result in an incomplete claim under the statute--Statute not saved from vagueness by specific intent element where acts proscribed are not made definite—Statute applies to anyone who files fraudulent claim, including attorneys of injured third parties-Conspiracy-Statute prohibiting attorneys from conspiring with claimant to make false and fraudulent insurnncc claim npplics to third party claims-Statute provides adequate notice of proscribed conduct and is not unconstitutionally vague—Prosecution is npproprintc in iustnnt case for all counts except those which rise or fall solely and completely upon charge of Incompleteness

STATE OF FLORIDA, Appellant, v. MARK MARKS, P.A., et al.. Appellees. 4th District. Cnsc Nos. 93-3259 and 94-0339. L.T. Case No. 90-6433 CF10A,B,J. STATE OF FLORIDA, Appellant/Cross-Appellee, v. MARK MARKS, P.A., MARVIN MARK MARKS, a/k/a MARK MARKS, and GARY MARKS, Appellees/Cross-Appellants. Case No. 93-3308. L.T. Case No, 93-501 CF10A,B,C,D. Opinion filed March 29, 1995. Consolidated appeals and cross-appeal from the Circuit Court for Broward County: Robert Lance Andrews, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, Richard L. Polin, Assistant Attorney General, Miami, T. Don Tenbrook, Assistnnt State Attorney, Fort Lauderdale. for appellant/cross-appellee. H. Dohn Williams, Jr., of H. Dohn Williams, Jr., P.A.. Fort Lauderdale, for Appellee/Cross-Appellant-Mark Marks, P.A. Mark Hicks of Hicks, Anderson & Blum, P.A., and Nerd Sonnett, Miami, for Appellee/Cross-Appellant-Marvin Mark Marks a/k/a Mark Marks. Archibald J. Thomas. III, of Archibald J. Thomas, III, P.A., Jacksonville. for Appellee/Cross-Appellant-Gary Marks. Edward A, Carhart of Edwnrd A. Carhart, P.A., Coral Gables, for Appellee-Irene Porter f/k/a Irene Rnddatz. Ronald S. Guralnick of Ronald S. Guralnick. P.A., Miami, for Appellees-Denise Beloff and Noreen Roberts. J. David Bogenschutz of Bogenschutz & Dutko, P.A., Fort Lauderdale, fur Appellee-Ronald J. Centrone. Edward Shohat, Miami, for Appellee-Carl Borgan.

(PER CURIAM.) Following oral argument, we sua sponte consolidated all three of the subject cases arising out of the trial court's three orders of dismissal being appealed, as there is a common constitutional issue among all three; namely, whether section 817.234(1), Florida Statutes (1987), is unconstitutionally vague as applied to attorneys in the representation of their clients. We conclude that the legislature intended the insurance fraud statute to apply to third party claims; and that prosecution is appropriate in this case for all counts except for those which rise or fall solely and completely upon the charge of ***incompleteness,*** as will be discussed hereinafter.

There are two informations involved in this appeal. The first was an amended information, filed in 1992, against eight defendants, containing thirty-five counts, the style of which was as follows:

STATE OF FLORIDA.	CASE NO. 90-6433CF10 AMENDED INFORMATION FOR:
Plaintiff,	
	COUNT 1: RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT (R.I.C.O.)
vs.	
MARVIN MARK MARKS a/k/a Mark Marks.	COUNT 2: CONSPIRACY R.I.C.O.
	COUNT 3: SCHEME TO DEFRAUD
GARY MARKS,	COUNT 4-13: PEFUURY
CARL RORGAN.	COUNT 14: GRANDTHEFT
IRENE RADDATZ a/k/a Irene Porter,	COUNT 15: INSURANCEFRAUD
	COUNT 18: GRAND THEFT
NOREEN ROBERTS,	COUNT 19: INSURANCEFRAUD
DENISE BELOFF,	COUNT 20: GRAND THEFT
RONALD J. CENTRONE, and	COUNT 22-23: INSURANCE FRAUD
MARK MARKS. P.A.. a Florida Professional Corporation,	COUNT 29-30: GRAND THEFT
	COUNT 31-33: INSURANCE FRAUD
	COUNT 34: GRAND THEFT
	COUNT 35: INSURANCEFRAUD
Defendants.	

The second information contained 11 counts against four of the eight defendants, the style of which was as follows:

STATE OF FLORIDA.	INFORMATION FOR:	
Plaintiff,	count I-2:	Insurance Fraud 3 F
	Count 3:	Grand Theft 2 F
vs.	Count 4-5:	Insurance Fraud 3 F
	Count 6-7:	Grand Theft 3 F
MARVIN MARK MARKS, a/k/a MARK MARKS.	Count 8:	Insurance Fraud 3 F
	Count 9:	Grand Theft 3 F
GARY MARKS,	Count IO:	Insurance Fraud 3 F
RONALD J. CENTRONE. and MARK MARKS, P.A.,	Count II:	Grand Theft 3 F
Defendants.		

Two appeals, consolidated by a prior order of the motion panel in Case Nos. 93-3259 and 93-3308, involved two orders entered by the trial court in October, 1993. One order dismissed counts 15, 18, 19, 22, 23, 29, 30, 31, 32, 33, 34 and 35, as well as predicate acts M, P, Q, T, U, AA. BB. CC. DD. EE. FF and GG of the RICO count in the 1992 amended information. The second order dismissed counts 1, 2. 3. 5, 7, 8. 9, 10, and 11 of the second information in this case, The underlined counts and predicate acts were dismissed because of the trial court's view that section 8 17.234(1) was unconstitutional, or did not apply in a third party context [1]; the remaining counts and predicate acts, apparently because of its view that section 817.234(3) was also unconstitutional or did not apply in a third party context.[2]

On January 27, 1994, the trial court entered a subsequent order, dismissing predicate acts R and S of Count 1, and Counts 20 and 21 of the 1992 amended information, saying:

> In the case at bar, this court concludes that unconstitutional vagueness lies only in the fraudulent omission as applied to attorneys engaged in the representation of their clients. The Court does not address the constitutionality of the term "incomplete" in any other context. Accordingly, the counts charging the Defendant with presenting an incomplete statement in support of a claim along with the corresponding count in grand theft should be dismissed.

The trial court's errors can be summarized as too draconian. It was unnecessary to dismiss all of the counts, given the trial court's limited, but justified constitutional concern for the word "incomplete" as it applies to attorneys in their representation of clients. Specifically. there was no legitimate reason to invalidate section 817.024(3), constitutionally or otherwise, to impair the

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prosecution based on that section. Further, it was error to dismiss the *grand theft* charges, or to dismiss any charge based on a *third party claim* not solely dependent on the allegation of incomplctc- ncss.

We, therefore, reverse all of the orders of dismissal and remand with direction to reinstate all of the counts and predicate acts except those which are *totally and* exclusively dependent upon alleged incomplete statements tendered by the attorneys in representation of their clients. Only to this extent do we affirm the trial court's actions, since we find that its application of "vagueness" beyond that to be crroncous.

I

VAGUENESS

In the instant case, appellees were charged pursuant to section 817.234(1) with submitting "incomplctc" insurance claims to insurers. Appellees allegedly sent demand letters to insurance companies which omitted medical records or statements that would not be favorable to their claim. The trial court found the term "incomplete" made the statute vague as applied to attorneys.

Section 817.234 does not define "incomplete." The uniqueness of an attorney's obligations in an adversarial context makes the lack of guidance as to what constitutes an incomplete claim problematic. As the trial court stated in its January 27, 1994 order: "Attorneys arc expected to zealously represent their client's intcrcst. In an advcrsaty system such as ours the contending parties presume that evidence is marshaled competitively."

Attorneys are guided by numerous different rules,' laws, and cases dealing with the atypical obligations of an attorney in an advocate role. Attorneys and their clients enjoy a confidential relationship, which includes constraints upon information that can be disclosed to others. See § 90.502, Fla. Stat. (1993); R. Regulating Fla. Bar 4-1.6. Once a suit is initiated, rules of discovery provide for an exchange of information between adversaries. Even then, some items do not have to bc disclosed to an adversary absent special findings by a trial court. Fla. R. Civ. P. 1.280(b). Specifically, the identities and/or opinions of a non-witness work product expert arc not discoverable absent a showing of exceptional circumstances under rule 1.280(b)(4)(B). *Myron v. Doctors Gen., Ltd.*, ***573 So.*** 2d ***34*** (Fla. 4th DCA 1990). Medical reports bnscd on an examination rcqucstcd by a party do not need to be delivered absent a request for such. Fla. R. Civ. P. 1.360(b); ***Smiles v. Young, 271 So.*** 2d 798 (Fla. 3d DCA), *cert. denied,* 279 So. 2d 305 (Fla. 1973). In personal injury protection claims, a party must turn over all medical records concerning a specific condition only after requesting and receiving a copy of medical reports from a medical examination requested by the insurer, § 627.736(7)(b), Fla. Stat, (1993). Finally, the confidentiality of medical records is statutorily protcctcd from disclosure in most circumstnnccs until a proper subpoena has been issued. See, e.g., § 455.241(2), Fla. Stat. (1993).[3]

As evidenced above, attorneys must be aware of various statutes, rules of proccdurc, and professional regulations when determining what information to disclose to other parties. Thcsc ethical and professional standards may bc considered in construing a statute. ***See State ex. rel. Escambia County v. Behr, 354 So,*** 2d 974 (Fla. 1st DCA 1978), *affirmed,* ***384 So.*** 2d 147 (Fla. 1980). The legal education courses suggest that the common practice among plaintiffs' attorneys in Florida is to provide less than complete disclosure. In an adversarial context, an attorney would rightfully be confused as to what conduct would subject him or her to punishment for filing an "incomplctc" claim under Florida's insurance fraud statute.

The state repeatedly argues, as it did below, that the specific intent required under section 817.234(1) saves the statute from being vague. It also asserts that the statute does not rcquirc com- only when there is an intent to defraud, deceive or inj insurer," According to the state, the statute provides su notice to attorneys of what behavior is proscribed by it bec the scicnlcr requirement.[4]

However, a requirement of intent does not automatical a statute from being vague. In ***State v. DeLeo***, 356 So. (Fla. 1978), the defendant was charged with official mis under section 839.25(1)(c), Florida Statutes. "Official M duct" involved the commission of specific acts enumerated statute, "with corrupt intent" to obtain a benefit for h *DeLeo*, 356 So. 2d at 307. One of the acts was "[k]no violating, or causing another to violate. any statute or la adopted regulation or rule relating to his office." ***Id.,*** q section 839.25(1)(c). Despite the scienter elements, the found the statute to be unconstitutional under the due p clauses of both the federal and Florida Constitutions. ***Id*** holding, the court observed that:

> [T]he violation must be proven to have been committ corrupt intent. This element of the offense might pre arbitrary application, but it does not. All that it is neces intent to be corrupt is that it be "done with knowledge that is wrongful and with improper motive." This standard vague to give men of common intelligence sufficient wa what is corrupt and outlawed, therefore, by the statu "corruption" element, as defined, does nothing to c statute's susceptibility to arbitrary application.

Id. at 308 (footnotes omitted).

In other cases, the Florida supreme court has found a st bc unconstitutionally vague, despite the presence of a s requirement, where other portions of the statute require ordinary intelligence to guess what conduct is proscribed statute. In ***State v. Barquet, 262 So.*** 2d 431 (Fla. 1972), preme court held Florida's abortion statutes vague where of ordinary intelligence must guess at the meaning of the 'ncccssaty to preserve the life of such mother,' " despite n ments in the statutes that the person intend to destroy the procutc a miscarriage. ***Id.*** at 435. In ***State v. Rou,*** 366 ***So,*** (Fla. 1978), the supreme court held section 112.313(3), Statutes (1973), to bc unconstitutionally vague. 112.3 13(3) made it improper for stale or county employees their official position to secure "special privileges or e tions." *Id.* at 385. The court found that the term "specia leges or exemptions" afforded no guidelines for determi standard of guilt. *Id.* Even though the statute itself did n forth a scientcr element, the court observed:

> It is argued that the prosecution must prove beyond a reas doubt that the officeholder acted with a *specific intent* of b ing himself or another in derogation or disregard of the public welfare. But this is an after-the-fact determination.

Id. at 386 (emphasis added).

The state is trying lo use the intent language to make c that which is undefined in the insurance fraud statute.[5] Si it dismisses the continuing education lectures and publi advocating withholding of information by asserting that i circumstances, "there is no intent to defraud." Howcvc does the state know such?

Another troublesome aspect of applying criminal sa for fraud against an attorney in an adversarial position for an "incomplete" claim is the absence of a duty to discl information. The trial court found, and the state concurs peal, that the insurance fraud statute does not create a duty disclosure. A fraud is commitled for the failure to disclose rial information only when there is a duty to disclose su such duty arises when one party has information that th party has a right to know because of a fiduciary or other r of trust or confidence between them. *Chiarella v. United S* **445** U.S. 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980). cited by the state to demonstrate that civil fraud causes of

case. These cases involve contractual disputes, and do not support a finding of fraud when an attorney does not disclose material information to his adversary. See, e.g., *Ramel v. Chasebrook Constr.* Co., 135 So, 2d 876 (Fla. 2d DCA 1961).

The state also asserts the requirement that the undisclosed fact be "material" saves the statute from vagueness, as it creates a "double scienter." Undoubtedly, attorneys know what facts are material when negotiating damages with an insurance company; however, this argument misses the point. The lack of guidance as to what constitutes an "incomplctc" claim when an attorney is dealing with an insurance company in an adversarial context, is the root of the evil.

As far as can bc ascertained, the state can not specifically identify when an omission of information by an attorney in an adversarial context is fraudulent, other than to say that an omission is fraudulent when there is an intent to defraud. Such circular reasoning cannot withstand appellees' vagueness challenge. The state's interpretation of the statute could lead to arbitrary enforcement. Intent, in so many instances, boils *down* to a factual finding based on inferences from evidence. The state admits that cases involving "incomplete" claims, specifically those involving omitted medical records, would have to be determined on a case by case basis. It also maintains that if a case lacks materiality or intent "a prosecution cannot succeed." However, an unsuccessful prosecution will result after chnrgcs arc brought and evidence is presented to a jury. Intent is an "after-the-fact" determination. *Rou*, 366 So. 2d at 386. An adjudication of not guilty may clear an attorney's name, but "it cannot undo the harm inflicted upon him and his career by such a charge." *Id.*

"What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, can not avoid incompleteness." *State v. Wershow*, 343 So. 2d 605, GO8 (Fla. 1977), quoting the dissent in *Screws v. United Stares, 325* U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1944). The *Wershow* court further stated:

> It wouiri certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large, This would, to some extent, substitute the judicial for the legislative department of the government.

Wershow, 343 So, 2d at 608, quoting *United Stares v. Reese, 92* U.S. 214, 23 L.Ed. 563 (1876).

In sum, section 817.234(1) is unconstitutionally vague in its application to attorneys in the representation of their clients, as it does not provide adequate notice when omissions will result in an "incomplete" claim under the statute. Given the various statutes, rules, regulations, and customs involving disclosure of information by an attorney to adversaries, the statute forces attorneys to act at their peril when dealing with insurance companics prior to a trial. The spccitic intent element does not save the statute since it does not make definite which acts are proscribed. A finding that the statute is vague does not mean that the legislature may not prescribe punishment for attorneys who commit insurance fraud. It simply means that the current legislation is inadequate to do so in a constitutional manner.

II

TIIIRD-PARTY CLAIMS

A. Section 817.234(1), Florida Statutes (1987)

Even though WC find section 817.234(1) to bc unconstitutionally vague as it applies to attorneys in the representation of their clients, we are compelled to address the srarute's applicability to siruations involving third pany claims. The trial court extensively reviewed the legislative history of section 817.234 and its relationship to the nonjoindcr statute, section 627.7262, Florida Statutes (1987). It also looked at the language in the current nonjoinder statute, section 627.4136, Florida Statutes (1993). After doing the same, we respectfully disagree with the trial court's finding on this issue, and hold that section 817.234(1) applies in the third party context.

In 1977, the legislature adopted the revised insurance fraud statute, and a predecessor to the current nonjoinder statute for liability insurers. Chap. 77-468, Laws of Fla. Initially, the two stntutcs, although both dealing with insurance, are not on the same subject matter. The nonjoinder statute was passed in an attempt to preclude third parties from joining insurance companies in lawsuits, and in response to the supreme court's decision in *Shingleton* v. *Bussey*, 223 So. 2d 713 (Fla. 1969), which permitted joinder of insurance companies so that "all the cards are on the table[.]" *Id.* at 720. The policies behind the nonjoinder statute have to do with judicial expediency and an insurance company's ability to avoid litigation until liability is firmly established. At the same time, the insurance fraud statute addresses improper behavior by individuals in the claims process. This statute has remained in substantially the same form since 1977, except that it was renumbered and moved to chapter 817, which addresses all types of fraudulent practices. This suggests that section 817.234 has more to do with fraud than insurance per se.

There is no indication that the legislature intended the insurance fraud statute and the nonjoinder statute to be read together. *Compare Major* v. *State*, 180 So. 2d 335 (Fla. 1965) (one statute (section 817.40) defined certain terms and the other statute (section 817.41) prohibited certain activities and proscribed punishment). Nor is this a case where the interaction of two separate statutes is necessary to resolve an *issue. See, e.g., Lucente v. Stare Farm Mut. Auto. Ins. Co.,* 591 So. 2d 1126 (Fla. 4th DCA), *rev. denied*, 601 So. 2d 552 (Fla. 1992). In order to resolve the issue of whether an insurer's failure to comply with section 627.7264, Florida Statutes (1989) permitted a direct third party action under that statute and section 624.155, Florida Statutes (1989), this court looked to the nonjoinder statute, section 627.7262, Florida Statutes (1989), since it was passed in the same act as sections 627.7264 and 624.155. *Id.* at 1128.

In the instant case, the nonjoinder statute does not relate to the insurance fraud section in such a way as to assist a court in determining the applicability of section 817.234(1) to attorneys in third party claim situations. Moreover, the two statutes have taken divergent paths since 1977. A nonjoinder statute practically identical to the one passed in 1977 was declared unconstitutional in *Markert* v. *Johnston*, 367 So. 2d 1003 (Fla. 1978). Another version of the statute was not enacted until 1982, and was ruled constitutional. *VanBibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880 (Fla. 1983). The revised nonjoinder statute is markedly different than the previous statute. § 627.7262, Fla. Stat, (Supp. 1982). Meanwhile, as previously mentioned, the insurance fraud statute was removed from the insurance portions of the statutes and placed in the general fraudulent practices portions, chapter 817. Based on these circumstances, Ihc nonjoinder statute and the insurance fraud statute need not be read in light of each other.

The trial court relied upon the current nonjoinder statute, section 627.4136, Florida Statutes (1993), to support its holding that section 817.234 applies only to first party claims. Section 627.4136(1) provides that a condition precedent to the accrual of a cause of action by someone other than the insured is obtaining a settlement or verdict against the insured. Section 627.4136(2) states that no person other than an insured has an interest in a policy until obtaining a settlement or verdict against the insured for a cause of action covered under the policy.

According to the trial court, if a third party does not have an interest in the policy, then it could not file a claim pursuant to the policy. Therefore, since the insurance fraud statute is couched in terms of filing a claim, it necessarily follows that only first party claims, those of the insured under the policy, are susceptible to the provisions of section 8 17.234.

Section 817.234 does not define the term "claim." The trial court seems lo hold that section 817.234(1) defines a claim as "a

claim for payment or other benefit pursuant to an insurance policy." Using a term Lo define itself is circular. Also, the nonjoinder statute allows a suit to bc filed against an insured, or an interest to be obtained in a policy, after a settlement or verdict has been rcachcd. Implicit in reaching a settlement, which could occur in a pretrial setting, is negotiations between the insurer and the injured third party--and his or her attorney. Some kind of demand or claim for compensation must be made prior to setting the wheels of negotiation into motion.

The cases cited by the trial court do not fortify its position on this matter. *Cardenas v. Miami-Dade Yellow Cab Co., 538 So,* 2d *491* (Fla. 3d DCA), *rev. dismissed, 549 So.* 2d *1013* (Fla. 1989), which hctd that the term "any person" in section 624.155(1), Florida Statutes (1985), meant "any insured party," has been spccificatty disapproved by *Conquest v. Auto-Owners Insurance* Co., 637 So. 2d 40 (Fla. 2d DCA), *rev. grunted,* __ So. 2d __ (Fla. Dec. 6, 1994) (TABLE NO. 83,827). Even so, the *Conquest* court found that a third party suit was improper since section 624.155 defines bad faith refusal in terms of acting in the "insured's" best interest. § 624.155(1)(b)(1), Fta. Stat. (1991). There is no such "back-up" in section 817.234(1) precluding its application to third party claims.

The trial court found the holding in ***People v. Learman***, 121 N.Y.S.2d 388 (N.Y. App. Div. 1953), "particularly instructive." *Learman* involved an insurance appraiser accused of violating New York's insurance fraud statute by filing two loss appraisals on the same vehicle even though it had been invotvcd in only one accident. The court found the language in that state's insurance fraud statute, "loss upon a contract of insurance," related to a "situation when an insured or someone having a right to be paid for a loss under the terms of a policy makes a claim against the insurance company based upon the contract of insurance." *Id.* at391.

Section 817.234(1)(a)(1) uses language similar to the New York law. Florida's statute makes it improper to fraudutcntty make "a claim for payment or other benefit *pursuant to an insurance policy*[.]" (emphasis added). However, *Learman* invotvcd a unique set of circumstances. and the court held that the statute at issue punished the submission of a false report, not a truthful one as submitted by Learman. *Learman*, 121 N.Y.S.2d at 389. After concluding such, it interpreted the statute to apply to claims by insureds. *Id.* at 39 1.

The holding in *Learman* is not controlling in Florida. We find persuasive two California cases which have appticd that stale's insurance fraud statute to attorneys of third parties. In *People v.* Benson, 23 Cal. Rptr. 908 (Cal. App. 2d Dist. 1962), *cert. denied, 374* U.S. 806, 83 S. Ct. 1691, 10 L. Ed. 2d 1030 (1963), the attorney defendant claimed he could not be convicted under that state's insurance fraud statute since neither of his clients had a contract with the insurance companics." The court noted that although a judgment must first bc secured before an injured party has a cause of action against an insurer on a policy, the insurance fraud statute apptics to every person who has an intent to defraud. Benson, 23 Cat. Rptr. at 916. The court said:

> We propose to be realistic in our interpretation of [section 556's] coverage, particularly in the light of the circumstances at bar. It is a matter of common knowledge that insurance companies ncgotiatc settlements directly with injured parties or their attorneys because of the liability of the insured.

Id. In so holding, the *Benson* court specifically declined to follow the holding in *Learman*. *Benson*, 23 Cal, Rptr. at 917.

In a more recent decision, a California appcttatc court reversed an order granting a motion to dismiss charges against an attorney who submitted demand letters containing false information in a third party context. *People* v. *Petsas*, 262 Cat. Rptr. 467 (Cal. App. 1 Dist. 1989). The court held that the facts of that case supported a finding of probable cause that Petsas had violated the insurance fraud statute in a third party context. *Id.* at 472.'

In conclusion, WC find that sccrion 817.234(1) applies to anyone who would file a fraudulent claim, including attorneys all injured third parties. Subsection 1 uses the unambiguous term "Any person," while other sections of the same statute use other terms, such as "insured" and "claimant." This suggests that the legislature intended different applications of each section of the statute. Other perceived problems with the language in the statute, such as the meaning of the term "incomplete," could, and does, render section 817.234 vague as applied to attorneys, but not necessarily inapplicable to them.

Language in the nonjoinder statute is not dispositive. Although the original versions of the insurance fraud and nonjoinder statutes were passed in the same act, these statutes have taken widely divergent paths since then. Most importantly, the insurnncc fraud statute has been moved from the insurance portions a, the statutes to the part dealing with fraudulent acts.

The application of similar insurance fraud statutes to third party situations in California and Oklahoma suggest that application of Florida's statute to an attorney representing a third part against an insurer would not be an extraordinary and harsh result *Petsas*, 262 Cat. Rptr. 467, is particularly instructive, as the case involved an attorney of an injured third party whose demand letters provided the basis for the charges under California's insurance fraud statute. This court recognizes, as did the California court in *Benson*, 23 Cat. Rptr. 908, that insurance companies ncgotiatc with third parties and their attorneys. This is true despite the nonjoindcr statute, which impticdty recognizes such by providing that an uninsured would have a cause of action and/or an interest in a policy upon obtaining a settlement. It is axiomatic that scttlcments are negotiated. Fraud committed in this context should be punishable, assuming a valid statute proscribing punishment for such.

B. Section 817.234(3), Florida Statutes (1987)

In its October 14, 1993 order in trial court case no. 90-643 the trial court dismissed charges against the attorney defendant brought under section 817.234(3). In count 15 (and predicate act M) of the Information, the state alleged that appcltecs conspired with a claimant, Howard Drinks, to make a false and fraudulent insurance claim in violation of section 817.234(1)(a). Specifically, appcttees allegedly urged Drinks to falsely testify in deposition in violation of section 817.234(3). The same allegations were made against appettees in count 22 (and predicate act T) as to another claimant, Sharon Mitts, except she was urged to exaggerate her pain; and, in count 23 (and predicate act U) wherein appellees allegedly urged Phillip Gummage to undergo unnecessary surgery.[8]

The trial court apparently dismissed these charges because they involved third party claims, In its October 14, 1993 order the trial court found that the meaning of the word "claimant" in 817.234(3) was governed by the language in the current nonjoinder statute, section 627.4136, Florida Statutes (1993). The trial court found that "claimant" meant "any insured" and, thus section 8 17.234(3) would not apply in third party contexts. Since the trial court's analysis fails as to whether section 817.234(apptics to third party actions, then its analysis as to 817.234(must also fait.

Section 817.234(3) spccitically applies to attorneys who conspire with claimants to violate any of the provisions of section 817.234. "Claimant" is defined as "[o]ne who claims or asserts a right, demand or claim." *Black's Law Dictionary 225* (5th ed. (1979)). A third party injured by another and seeking damages from an insurance company is asserting a demand for compensation,

Attorneys arc on notice, and section 817.234(3) is not vague in and of itself. Further, section 817.234(1) is vague only as applies to attorneys. If Mitts, Drinks, or Gummagc titcd a false or misleading report under section 817.234(1), and appell conspired with them to fraudulently do so, then charges could brought against appellees under section 817.234(3) without

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same constitutional problems as under section 817.234(1). A cursory review of the information shows that the allegations are adequate to support the charges. Because we conclude that the statute does apply to third party claims, and section 817.234(3) does not suffer the same vagueness shortfall as section 817.234(1), the dismissal of the counts brought pursuant to section 817.234(3) was erroneous. (HERSEY, GLICKSTEIN and POLEN, JJ., concur.)

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[1]Section 817.234(1), Florida Statutes (1987), provides:

(l)(a) Any person who. with the intent to injure. defraud. or deceive any insurance company, including. but not limited to, any statutorily created underwriting association or pool of insurers or any motor vehicle, life, disability, credit life. credit, casualty, surety. workers' compensation, title, premium finance. reinsurance, fraternal benefit, or home or automobile warranty company:

I. Presents or causes to be presented any written or oral statement as part of. or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim; *or*

2, Prepares or makes any written or oral statement that is intended to be presented to any insurance company in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim,

is guilty of a felony of the third degree, punishable as provided in s. *775.082.* s. *775.083.* or s. 775.084.

(b) All claims forms shall contain a statement in a form approved by the Department of Insurance that clearly states in substance the following: "Any person who knowingly and with intent to injure. defraud, or deceive any insurance company files a statement of claim containing any false. incomplete, or misleading information is guilty of a felony of the third degree."

[2]Section 817.234(3), Florida Statutes (1987). provides:

(3) Any attorney who knowingly and willfully assists, conspires with, or urges any claimant lo fraudulently violate any of the provisions of this section or part XI of chapter 627. or any person who. due to such assistance, conspiracy, or urging on such attorney's part. knowingly and willfully benefits from the proceeds derived from the use of such fraud, is guilty of a felony of the third degree, punishable as provided in s. 775.082. s 775.083, *or s. 775.084.*

[3]The trial court, in one of its October 14, 1993 orders, discussed Florida Bar Continuing Legal Education (CLE) courses which encourage selective disclosure of information during presuit negotiations. Appellees direct this court's attention lo such in this appeal as well. In a 1989 course entitled "Settlement of The Personal Injury Case," the speaker emphasized the advantages of controlling information provided to the other side, stating that a plaintiffs attorney has a strategic advantage by being able to control the flow of information. The speaker related a story in which he prepared an extensive settlement brochure consisting of about twenty exhibits, but omitted any reference to a zero impairment rating. The case settled, and the speaker observed: "I had serendipity, I mean I just, it went great and nobody ever asked the question. *Um, you know there's no crime against that. I mean nobody has to know and if nobody asked it I guessed it didn't hurt anybody."* (emphasis added). Similarly, at the 1989 Seminar on "Basics of Personal Iniury Litigation." presented bv the Florida Bar CLE Committee, attorneys were reminded that Ihky have complete control of the flow of information before a suit is filed. The attorneys were urged to develop the strengths of their case. and reminded that their weaknesses were not discoverable until a suit is filed. Even the Florida Practice Guide on Personal Injury, co-authored by United States District Court Judge William Hoeveler, encourages selective disclosure during settlement negotiations.

[4]The United States Supreme Court bas recognized "that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates v. Flipside, Hoffman Estates. Inc., 455 U.S. 489, 102 S.* Ct. 1186, 1193, 71 L. Ed. 2d 362 (1982).

[5]In *Screws v. United States*, *325 U.S.* 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945), the United States Supreme Court made a statement applicable in the instant case: "Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined. certainly arc in no nosition to sav that they had no adcouatc advance notice that they would be visited with punishment." *Id.* at 1037.

In *Hygrade Provision Co. v. Sherman*, *266 U.S. 497. 45 S.* Cl. 141. 69 L. Ed. 402 (1925), the Supreme Court upheld a statute which made it a crime to falsely represent. with intent io defraud. that foods were kosher or prepared under orthodox Hebrew religious requirements. The Supreme Court noted that whatever difficulty appellants had with determining what was kosher is immaterial since they were "not required to act at their peril but only to exercise their judgment in good faith" to avoid coming under the statute. *Hygrade Provision* Co.. 45 S. Ct. at 142. At the same time, the Court stated that the evidence "warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade [of dealing with kosher foods] lo correctly apply it, at least as a general thing." *Id.* Hence, *Hygrade* Provision Cu. would not uphold the statute in the instant case as there is no general understanding of the meaning of the term "incomplete" in the context of an adversarial relationship involving no attorney's representation of a client.

[6]The California appellate court quoted the insurance fraud statute in its opinion:

> Section 556 of the Insurance Code: 'It is unlawful lo: (a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance. (b) Prepare, make, or subscribe any writing. with intent to present or use the same, or to allow it to be presented or used in support of any such claim. Every person who violates any provision of the section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both.'

Benson, 23 Cal. Rptr. at 909 n.1.

[7]The Oklahoma Court of Criminal Appeals has rejected the notion that Oklahoma's insurance fraud statute would apply only in situations where there is privity of contract between the *accused* and the insurance company. *Kiddie* v. *State*, 574 P. 2d 1042 (Okla. Crim. App. 1977). Oklahoma's statute, as cited in the opinion, is very similar to Florida's, and premises the fraudulent behavior on a claim "upon any *contract* of insurance." *Id.* at 1046. quoting Okla. Stat. tit. 21. § 1662 (1971).

[8]None of the parties on appeal discuss whether the charges brought under section 817.234(3) could stand despite a finding that section 817.234(1) is unconstitutionally vague. They seen; to take an-"all-or-nothing" approach to section 817.234, which is incorrect.

* * *

Torts—Medical malpractice—Sovereign immunity—Error to enter summary judgment on ground of sovereign immunity in favor of defendant physicians who were working as consultants for Children's Medical Services facility, a facility created to provide medical services to indigent children and run by Florida Department of Health and Rehabilitative Services—Factual issues required to be considered to determine issue of agency relationship between Children's Medical Services and consultants

MINOUCHE NOEL, a minor, by and through her natural guardians, JEAN NOEL and FLORA NOEL, Appellants, v. NORTH BROWARD HOSPITAL DISTRICT, etc., et al., Appellees. 4th District. Case Nos. 93-0752 & 93-1731. L.T. Case No. 90-31916 (13). Opinion filed March 29, 1995. Consolidated appeals from the Circuit Court for Broward County, Leroy H. Moe, Judge. Counsel: Joel S. Perwin of Hurlbut, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, and Sheldon J. Schlesinger, P.A., Fort Lauderdale, for appellants. Paul E. Kalb and Carter G. Phillips of Sidley & Austin, Washington, D.C., for Appellees-Hospital. Douglas M. McIntosh and Deborah A. DeNike of McIntosh, Sawran & Cartiven, P.A., Fort Lauderdale, for Appellee-Drs. Williams, Harper & Sirois, Professional Association. Robert Collier of Timothy J. Payne, P.A., Fort Lauderdale, for Appellees-Watson. Gary M. Farmer, Jr., of Bunnell, Woulfe & Kelly, P.A., Fort Lauderdale, for Appellees-Stoll. Bartley C. Miller and Wendy Lynn Henshaw of Panza. Maurer, Maynard & Neel, P.A., Fort Lauderdale, for Appellee-Sirois. John E. Thrasher, Jacksonville. for Amicus Curiae-Florida Medical Association. Jane Kreusler-Walsh of Jane Kreusler-Walsh, P.A., West Palm Beach. for Amicus Curiae-HRS.

(RAMIREZ, JUAN, JR., Associate Judge.) Appellants, a minor child and her parents, seek relief from final summary judgments rendered in a medical malpractice suit in favor of appellees, Amos W. Stoll, M.D., Allen S. Watson, M.D., Sonia Hodge, M.D., Ronald C. Sirois, M.D. and their respective professional associations. We reverse.

Appellees moved for summary judgment based on sovereign immunity as employees or agents of the state. They had been sued for failure to diagnose and properly treat the minor child's condition of infected thoracic cord epidermoid. The failure to diagnose and properly treat by decompressing the pressure on her spinal cord resulted in permanent and painful disability. Appellees' work was performed at the Children's Medical Services (CMS) Broward facility run by the Florida Department of Health and Rehabilitative Services (HRS). CMS clinics were created pursuant to chapter 391, Florida Statutes (1993), to provide medical services to indigent children. Waiver of sovereign immunity for liability for torts is not extended to employees or agents of CMS. § 768.28(9)(a), Florida Statutes, (1993).

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Appendix B

CONFIDENTIAL

The Florida Bar - Continuing Legal Education Audiocassette.
BASIC PERSONAL INJURY 1989, COURSE NUMBER 6471
Taped 2/7-8/89.
TAPE III OF V

Speech on:

SETTLEMENT OF THE PERSONAL INJURY CASE

RANDY R. BRIGCS

AYRES, CLUSTER, CURRY, McCALL 7 BRICGS, P.A.
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Ocala, Florida 32678
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"Early on Plaintiff's counsel has a real strategic advantage in that you can control the flow of information that's being provided to the other side. You're not in suit, so there's no subpoena power of court and what is furnished to the carrier at that point in time is really up to you. The timing of what you supply can also be dramatically important and the timing of how fast you attempt to resolve your case can likewise be important."

***

RE: Settlement Brochures

"Not every case is deserving af a settlement brochure. Okay? I mean low end cases may not necessarily be deserving of this. When I was practicing defendse work almost exclusively I had a real eye opener one time. I had an excellent case, Plaintiff's case that came in that I took on. For the first time I had a young, attractive female client who had been in a horrible accident. The driver of the other car had been killed. The first time I saw my client she had a cast on every limb of

her body, had some scarring to go along with txat. She was musically oriented, you probably even would know who she was if I mentioned her name. It looked like a bad case and it was a bad case.

About a year later I got a report from her treating' orthopedist who said, in response to an inquiry I had made, said that she had zero impairment rating from all of her injuries. She had like 9 fractures, 4 casts on her body and she had no impairment ratings. Now everything had been a midshaft type fracture, okay? They had gotten good bone growth, good union, good positioning. All the joints worked when you put *on* the measurement tools and you start going through all the ranges of motions -- She was perfect. Heh heh heh. Zero impairment rating. She had medical bills of $50,000.00, $60,000.00 and so forth.

Urn, that scared me a littlle bit as to how I was going to handle that because for some reason impairment ratings are still real critical to insurance carriers in evaluations. Okay? Even though they tell me Rocky Blier came back from Viet Nam with like a 23% permanent impairment rating he played in the NFL far 6 years and I've seen 1 or 2% impaired people who are totally debilitated. But, nonetheless it's a problem if you don't have much of an impairment rating and you're a Plaintiff's lawyer.

So I decided to uh work around that shortcoming through the preparation of a pretty extensive settlement brochure which I did. It ended up being about a 25 page letter with about 2 inches worth of exhibits and about 20 different exhibits and

photographs and everything else in the world that you could think of EXCEPT reference to the impairment rating. And that case settled, I had serendipity, I mean it just, it went great and nobody ever asked the question. Um, you know there's no crime against that. I mean nobody has to know and if nobody asked it I guessed it didn't hurt anybody.

But: it sure sold me on the concept that when you have the opportunity to present your case in a closing argument form unobstructed by some lawyer jumping up and objecting, and unobstructed by nervousness and unobstructed by the shortcomings that you have in speaking and articulating your position, but you have a chance to write it and revise it and organize it and tab It and deloiver it when the receiving party then has a chance to review it themselves and pass that same closing argument to their supervisor, who then can review it and pass it to their supervisor who can then mail it to the home office and you only make it one time and it's perfect. I mean if it's not perfect then you haven't done your job. But it should be perfect. Uh, that goes a long way In the right kind of case, dealing with the right kind of carrier, in enhancing the recovery of your client.

Appendix C

*LECTURE OUTLINE:
—PLUS—
LECTURE PROGRAM
AND
SPEAKER EVALUATION FORM

THE TENTH ANNUAL

Basics of Personal Injury Litigation 1989 Seminar

February 7-8—April 18-19, 1989

The Florida Bar,
Continuing Legal Education Committee
and the
Young Lawyers Division

thirty days by F.S. 627.7264. Supply multiple copies of your insurance disclosure letter if it is directed to the defendant, for his distribution.

3. Help the carrier establish an appropriate reserve. The failure of a carrier to set an appropriate reserve an your case can impede settlement at a later date. Furnish the most explasive pieces of information reflecting the potential severity of the claim. Far example:

   a. Inflammatory photographs are useful.

   b. Selected hospital records.

   c. Relevant economic features.

B. Control the flaw of information. Keep in mind that at this stage you have a critical advantage, i.e., you have complete control of the flow of information. Information should be supplied to the carrier when it will have the greatest impact. Strengths of the case can be develaped and presented while weaknesses are not fully discoverable because the subpoena power of court has not been triggered by the filing of suit. This advantage is underscored when skeletans need to remain in the closet.

   1. Pre-suit settlement strategy should be carefully developed. Timing must be considered. Far example:

      a. You may insist that negotiations not begin far a year or more so that the greatest risk of complications (such as avascular necrosis) pass.

      b. On the other hand, you may wish to proceed rapidly in other cases (for example, those in which scarring may fade with time).

   2. You should maintain a separate ledger recording all settlement conferences with your client, negotiations with the carrier, and all references made to settlement. This will greatly assist you in developing a feel for settlement potential and will permit you

Appendix D

LECTURE OUTLINES
— PLUS —
LECTURE PROGRAM
AND
DESIGNATION CREDIT FORM

Mar

THE BASICS OF PERSONAL INJURY LITIGATION

The Florida Bar
Continuing Legal Education Committee
and the
Young Lawyers Section

Manual
3

THE PERSONAL INJURY PRACTICE ---

CASE EVALUATION, INITIAL INVESTIGATION

AND CONFERENCE WITH CLIENT

By:

Barry L. Meadow

Podhurst, Orseck, Parks, Josefsberg,
Eaton, Meadow & Olin, P.A.

Miurni, Florida

d. Gather everything you need before next letter.

C. Settlement Conferences.

1. Set the conference.

a. **Letter - "I** have set aside one hour **(one and a half hours) for you here in my** office on _____, 1982, at _____ o'clock _M. I have **available** to you and **for** your inspection **the following:"** (list).

b. Initial conference.

1. Should have available:
(a) All medical bills.
(b) **Physicians** records, **including** narrative reports and **pertinent portions of hospital records.**
(c) **Experts** reports.
(d) **Witness statements.**
(e) Photographs.

2. **There must** be an **"exchange" of information, i.e., adjuster must be prepared to supply:**

(a) **All** witness **statements.**
(b) Photographs.
(c) **Expert** reports.
(d) **Certified** copy of **insured's** policy, **including policy** itself and **declaration sheet(s)** showing **coverage.**

3. No meeting unless there is A mutual and **full exchange** of **information (good faith).**

4. Preparation **for conferences is essential.**

a. Psychology **of conference.**

1. You **impress them by having everything.**
2. You **are insisting on a mutually reasonable** condition to **exchange information** (critical to **adjuster).**
3. You **have set the tempo** - respectful, yet **assertive** and **you control.**
4. Don't give up anything, unless you get something in return.
5. If they **refuse to** meet **these** conditions, file **lawsuit.**

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Florida Practice Guide:

Personal Injury

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inquire as to whether the client has any questions; and ask the client to sign it after you have explained all the terms and conditions. *(See ¶¶ 1: 123–1:27; contingency fee requirements, see, ¶1:* 153 *ff.)* The client should, Of course, be given a conformed copy. This procedure helps commence the relationship on a note of trust and confidence.

D. ADVICE TO CLIENT UPON ACCEPTING EMPLOYMENT; EXECUTION OF NECESSARY AUTHORIZATIONS

1. [1:212] **Maintain Confidentiality:** It Is absolutely essential to caution the client not to discuss the case with anyone other than you (the attorney) or 'a representative from your office. Make sure the client understands that anything he *or* she says to third parties could be used later as an admission, or could cause an inadvertent waiver of the attorney-client privilege or other important privileges [see Fla Slat §90.507].

   a. [1:213] **Communicating** with adverse party: Any representative of the adverse party who attempts to contact your client should be *referred* to you immediately. Advise the client that the other side is not entitled to elicit information from him or her directly, and that discussions other than through you should be avoided [see RRFB Rule 4-4.2, prohibiting direct contact with adverse party who Is represented by *Counsel* In the absence of consent by that counsel].

      (1) [1:214] "'Written or recorded statement by client: It Is not uncommon for an insurance company or other representative of the adverse party to attempt to obtain a written or recorded statement from your client. Emphasize that the other side has no right to obtain the client's version of the facts at this time; and that the adverse party's motivation is simply to seek out Information that can be used to defeat the claim or reduce its value.

      (2) [1:215] What If a statement has already been given the opposition? Sometimes the client will have given a statement lo the adverse party before consulting with you. Ask the client for a copy of the statement, if he or she has one; or ask for a copy from the party who took the statement-usually the adverse party's Insurance carrier. If the insurance carrier (or other custodian) refuses to produce the statement, It can be obtained through

ties of litigation. It Is Impossible at this time competently to appraise the "true value' of the claim.

5. [1:254] **Obtain Relevant Authorizations:** To conduct a competent investigation of the case, counsel will occasionally need to obtain certain confidential records pertaining to the client. Many of these documents are not obtainable without the client's advance consent. As a matter of efficient practice, plan early for the consents that will be needed; and have your client execute the appropriate authorizations at the time the employment agreement is signed.

Specifically, secure authorizations that will allow you access to the following:

a. [1:255] All client's medlcal records

- *FORM; Client Authorization* To *Obtain Medical Records, see Form 1:L.*

b. [1:256] Cllent's employment records from past and present employers

- FORM: *Cllent Authorization* To *Obtain* Employment *Records, see Form 1:M.*

c. [1:257] Any other documents that may be helpful In prosecuting the claim on client's behalf: E.g.. school remrds, union records, job applications, etc.

- FORM: General *Authorization for* 'Release *of All Relevant Documents to Attorney, see Form 1:N.*

▶ [1:258] *PLAINTIFF'S* PRACTICE *POINTER:* 'Blank' authorizations are often forwarded bv the defense (typically by insurance carriers) to plaintiff's counsel, sometimes even before a lawsuit Is filed. The purpose, obviously, is to secure data that can be used for impeachment later on. Do not, under any circumstances. slqn these authorizations. If there is a good reason to furnish copies of plaintiff's records at this time. carefully tailored specific authorizations directed to a particular doctor, employer, etc. should be employed. And, make sure you and your client examine the sought-after records first, so that you're prepared to counter any attempted impeachment later on.

8. Keaplng Records

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employing someone at this stage who will simply parrot your opinion at deposition or trial frustrates many of the functions an expert could otherwise perform.

- Further, under some circumstances it may make sense to retain an expert who does not have an entirely favorable opinion. This is particularly so when there are relatively few available experts In the field. In this event, adverse experts are sometimes "employed' as consultants to tie them up and make them unavailable to the opposition. (A consulting expert's opinion Is protected 'work product.' Thus, his or her opinion Is not discoverable in most cases, as long as that expert will not be called to testify in the case. See *¶6:94 ff.)*

6. [2:261] Retaining Expert: After the appropriate expert Is selected from the series of initial contacts, he or she should be contacted again to work out the employment details.

   a. [2:262] **Capacity In which expert retelned:** At this stage, most attorneys retain their experts in a consulting capacity only, with the understanding that they may later be needed in a witness capacity as well (to testify at deposition and trial). The purpose Is to protect the confidentiality of the expert's Input: As discussed at ¶6:1 -- Chapter 6, opinions and writings generated by an attorney's consulting experts generally are nondiscoverable work product [Fla R Civ P 1.280(b)(3)(B); *see ¶6:94*]. But once the expert is expected to be a trial witness, the work product privilege terminates and the expert's identity, opinions, and reports are discoverable under Rule 1.280(b) [see Mims v. Casademont. 464 So 2d 643 (Fla App 1985)].

   ▶ [2:263] PRACTICE ***POINTER:*** Thls also helps insure that 'negative' experts won't be discovered by the opposition. As mentioned al *¶2:260,* sometimes there won't be an expert with an opinion favorable lo your position. Yet. if the field is sparse, your retaining a 'negative' expert as a consultant only, insures that any unfavorable opinion won't be discoverable by the other side. (01 course, in most cases, the opposition will be able lo find its own expert to testify In the case. But you may be able to develop Other bases upon which lo rebut that testimony.)

adverse party's insurance carrier will often assume that a jury would arrive at a similar opinion and thus evaluate the liability factors accordingly. (By the same token, if the officer's opinion places partial fault on claimant, plaintiff's counsel might be motivated to lower a settlement demand or to advise against prosecution of the claim as to certain of the potential defendants.)

(2) [2:67] Follow-up interview with Investigating Officer: The investigating officer often has helpful information which has not been committed to writing. Consequently, a follow-up Interview, either personally or through an investigator, Is important. The purpose should be to discuss the substance of the report with the officer and to obtain any further pertinent information; e.g., notes that the officer took during the investigation, which are often more substantive and revealing than the summary set forth in his or her official report.

e. [2:68] Obtain and examine all relevant medical reports: Independent verification of the client's postaccident medical condition is essential. Thus, all ambulance, paramedic;. hospital and treating physician records regarding the accident should be obtained.

(1) [2:69] These records should be reviewed In detail. In addition to information about dlagnoais and treatment. look for any statements made by your client, which are contrary to the information he or she gave you during initial consultations. If there are any conflicts, they must be reconciled immediately to avoid future impeachment.

(2) [2:70] The treating physicians end other medical care providers will release this information to plaintiff's counsel upon receipt of plaintiff's signed authorization. *(See* Form *1:L.)* However, these records are privileged. Hence, absent consent by plaintiff or plaintiff's attorney, they cannot be obtained by defense counsel until an action is. instituted and formal discovery is undertaken. *(See Ch* 6.)

f. [2:71] Obtain and examine employment records: Verification and documentation of lost earnings can be effected by obtaining a copy of plaintiff's employment

poses of the rule [RRFB Rule 4.42 (Comment)].

(c) [2:80] Potential adverse witnesses: Some attorneys feel that it Is better not to take a statement from an 'adverse' or "hostile" witness. Their rationale is that the statement is only fuel for the opposition. However, this reasoning Is generally misguided, and it may even backfire.

1) [2:81] Since opposlng counsel can obtain the same statement by interviews or depositions, reluctance to procure your own adverse witness statement, for fear that it will come into possession of the opposition, makes little sense.

2) [2:82] To the contrary, it is batter to pin down an adverse witness by taking his or her statement early. If subsequent testimony is inconsistent, the statement can be a powerful Impeachment tool!

▶ [2:83] *PRACTICE POINTER:* For this reason, it is often profitable to obtain a very explicit statement from potentially harmful witnesses. Attempt to elicit 8 lot of factual details which can be used for impeachment later on when the witness' recollection has faded.

- For example, instead of obtaining a conclusionary statement that "plaintiff was speeding," have the witness commit t o plaintiff's exact speed when he or she first observed plaintiff until the time of Impact. Often the estimated speed and similar facts will be greatly exaggerated. This sets up the witness for impeachment by other witnesses.
- Similar detail also should be obtained—e.g., the time during which the witness purportedly observed the parties, the distance from which the observation was made, obstructions

returned to work. Do not rely on it at all if there is any permanent disfigurement or continuing disability (scarring, blindness, paralysis, loss of limb, etc.). In these cases, the jury verdict likely will be many times higher than the claimed special damages.

Also keep in mind that there Is no "magic" formula. Intangible factors, such as the appearance and credibility of plaintiff, are significant in evaluating any claim.

C. EFFECTIVE SETTLEMENT NEGOTIATIONS

1. [4:66] Negotiations with Insurance Claims Representative: Most bodily Injury claims are settled before a lawsuit Is filed, and thus before the insurance carrier Is required to retain an attorney to represent the insured-defendant. In all likelihood, therefore, Initial settlement dlscussions will be with an Insurance claims representative.

   a. [4:67] Identifying the claims representative: By the time plaintiff's counsel Is ready to discuss settlement (i.e., marshalling of facts completed and fair settlement value appraised), the identity of the claims person assigned to the case should be known. This information ordinarily is divulged during the first contact counsel has wilh the Insurance carrier, apprislng it of claimant's intent to pursue a claim against the Insured. *(See ¶¶2:31–2:34 and Form 2:A).* Unless and until suit Is filed, this is the person to whom plaintiff's counsel usually will be directing all communications regarding settlement of the claim.

   b. [4:68] Claimant's counsel should open settlement negotiations: Some clalmants' attorneys feel that It Is a sign of weakness to be the first to suggest settlement. This attitude is far from realistic. As already indicated, both claimant and defendant have equal motlves to settle *(¶4:2 ff.).* But often the claims representative will not know whether claimant's condition has stabilized: he or she will be waiting to receive information about the claim and demand from claimant's attorney. Thus, counsel for claimant should take the first step toward commencing settlement negotlatlons.

   c. Information to provide the claims representative

      (1) [4:69] Reports and records of damager: An Insurance representative's responsibilities In antic-

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ipation of settlement differ little from those of claimant's counsel: The representative wilt be charged on behalf of the carrier with Investigating the facts of the case and formulatlng a fair settlement value. Consequently, there cannot be any meaningful settlement discussions until the claims person has had an opportunity to revlew whatever reports and records are available regarding claimant's Injuries and damages. indeed, copies of medical reports, bills and other documentary evidence will be essential to support the claims person's request for authority to extend a settlement offer.

With this in mind, it is in claimant's best Interest to furnish copies of the following:

(a) Ail medical bills relating to the injuries In question.

(b) All medical reports from clalmant's treating physicians, showing diagnosis, treatment and prognosis.

(c) Employer's verification of lost earnings, fringe benefits, and other economic losses suffered because of absence from employment.

(d) Property damage bills or repair estimates. (Even If property repairs were paid for by clalmant's own Insurance carrier—l.e., not collectible from the defendant-insured-the repair bills are relevant evidence of the severity of the impact.)

(e) It is also good practice to Include a cover letter with these documents, giving a brief description of the accident, summarizing the damages that are being claimed, and briefly stating why claimant Is entitled to recover (Le., liability factors and ssrlousness of injuries).

[4:70] *PRACTICE* POINTERS: Some attorneys still adhere lo the old-fashloned notlon that they should not cooperate with the insurance carrier, and thus should not voluntarily furnish any records or information regarding the claim. This is a foolish position:

- Claimant's interests are best served by an early settlement; however, there will not

be any settlement until the carrier is able to verify claimant's injuries and losses.

- Moreover, antagonizing an already adversary situation is-hardly conducive to settlement.
- Refusal to cooperate only delays the inevitable. Once suit Is filed, defense counsel can obtain all the above documenta through discovery (see *Ch 6).*
- Finally, an Insurance carrier can be placed in 'bad faith' only when it becomes aware of the reasonable value of a daim and refuses to negotiate a reasonable settlement *(¶4:11 ff.).* Lack of cooperation by plaintiff's counsel gives the carrier legitimate reason not lo negotiate a prompt settlement, with little risk of 'bad faith' exposure.

(2) [4:71] Compare—Information NOT to provide the carrier: At least initlaliy, It is generally best to limit voluntary disclosure to the records and reports described above: Ail other information should be kept confidentlai.

(a) **[4:72] Client's account of the accident:** Your client's statement3 to you about the occurrence are confidential communications, protected by the attorney-client privilege. So long as they remain 'confidential,' adverse parties are not entitled to discover their content through formal motion or to elicit their content -- at trial (fla Stat $90.502; and *see ¶6:59 ff.*].

1) [4:73] On the other hand, once these communications are disclosed to third parties, the privilege is waived [see* Fla Stat §90.507]. Even if liability appears clear. the defense might find Inaccuracies in the statements which can be used for subsequent Impeachment.

(b) [4:74] Witness statements: The names of eyewitnesses are discoverable (fla R Clv P 1.280(b)(1)]; but their statements may be protected from discovery if made 'In preparation of trial.' (See *¶6:102.)* Witness statements can

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be very important to claimant's position if the case goes to trial (e.g., to impeach defendant or defense witnesses). Hence, they should not be 'given away' during the initial stages of settlement negotiations.

(c) [4:75] Claimant's **past medical history:** It is generally unwise to volunteer information about claimant's earlier injuries or preexisting medical condition, since the defense will use this as a basis to deny that the injury resulted from the present incident (i.e., no "causation").

1) [4:76] However, there are a few instances in which the earlier medical history should be volunteered as where it will enhance the value of the claim—e.g., where the injury in question was a minor one, but aggravated a preexisting condition, causing severe disability. (Defendant cannot escape liability by contending that the damages would not have been incurred but for the preexisting condition; *see* §3:67.)

2) [4:77] And, of course, if the claims representative has already found out about the prior medical history, it may be necessary to furnish the pertinent records and reports to show that the prior condition was not the cause of claimant's present disability.

d. [4:78] **Making the initial demand:** Claims representatives rarely make the first settlement offer. Instead, they expect claimant's attorney to make an initial settlement demand.

(1) **Ascertaining initial demand amount**

(a) [4:79] **Have** a 'bottom line' figure in mind: Before making the initial demand, determine an absolute minimum amount that you believe the case should settle for—i.e., the least you would be willing to recommend lo claimant as a fair settlement. Negotiations should be conducted so as to permit a 'staged' retreat toward this 'bottom line' figure with the

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