IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,920

THE STATE OF FLORIDA,

Petitioner,

vs.

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

Respondents.

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In Circuit Court Case No. 90-6433, Seventeenth Judicial Circuit, the prosecution, through an amended information, charged multiple defendants - Marvin Mark Marks, a/k/a Mark Marks, Gary Marks, Carl Borgan, Irene Raddatz, a/k/a Irene Porter, Noreen Roberts, Denise Beloff, Ronald Centrone, and Mark Marks, P. A. - with multiple offenses, including racketeering, conspiracy to engage in racketeering, scheme to defraud, perjury, grand theft and insurance fraud. (R. 39).[1] The insurance fraud charges were based on section 817.234, Florida Statutes, Several of the named defendants are attorneys and one is a physician. The alleged activities included: withholding unfavorable medical reports when making demands on insurers; preparing and submitting false medical reports when making demands on insurers; suborning client perjury; urging the exaggeration of pain and suffering by a client; and urging unnecessary surgery.

Count 21 charged Marvin Mark Marks and Mark Marks, P.A., with insurance fraud under section 817.234(1)(a), Florida Statutes. (R. 61). That count charged that the defendants committed insurance fraud, in that they "did . . . unlawfully and with intent to injure, defraud or deceive Allstate Insurance Company present or cause to be presented a written statement as

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[1] "R." refers to the record on appeal in Foruth District Court of Appeal Case No. 94-339.

part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contained false, incomplete or misleading information concerning any fact or thing material to such claim, to-wit: presented a demand letter to Allstate Insurance Company an behalf of Neomia Williams which intentionally and fraudulently excluded a medical report and test. . . ." (R. 61).

Count 20, which charged the defendants, Marvin Mark Marks, Gary Marks, and Marks, P.A., with grand theft, did not include any of the foregoing factual allegations, but simply alleged that the defendants "did . . . unlawfully and knowing obtain or endeavor to obtain the property of Allstate Insurance Company, to-wit: money, of the value of three hundred dollars ($300) or more, with the intent to permanently or temporarily deprive Allstate Insurance Company of a right to the property or a benefit thereof, or to appropriate the right to their own use or the use of any person not entitled thereto. . . ." (R. 61). The offenses alleged in counts 20 and 21 were also alleged as predicate acts R and s in count 1, the racketeering count. (R. 46).

The defendants filed numerous motions to dismiss various portions of the information throughout the lower court

proceedings. (2R.[2] 135, 159, 162, 165, 174, 209, 250, 401, 484, 615, 755, 805, 965, 1162, 1215, 1244, 1293, 1454, 1483, 1523, 1535, 1539, 1547, 1575, 1647, 1846, 1872; R. 68, 97). Some of the foregoing motions and supporting memoranda focused on individual counts and the particular facts of those counts. Others were broad-based attacks on Florida's insurance fraud statute, section 817.234, Florida Statutes.

The motion to dismiss filed on August 13, 1990 (2R. 209), focused on three particular counts in addition to three of the predicate acts alleged in the RICO count. (2R. 209). That motion set forth several of the distinct arguments which the defendants would reiterate throughout the trial court proceedings. That motion presented the following arguments:

> 1. Section 817.234 invades the exclusive jurisdiction of the Florida Supreme Court to regulate professional conduct of attorneys.
>
> 2. Section 817.234 encroaches on the Florida Supreme Court's exclusive jurisdiction to enact rules relating to judicial practice and procedure.

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[2] "2R." refers to the record on appeal in Fourth District Court of Appeal case no. 93-3259. That case involved a related appeal from the dismissal of other counts of the charging document, and the record in that appeal contains most of the pretrial motions to dismiss, responses thereto, and memoranda of law, which, to a large extent, were omitted from the record in Fourth District case no. 94-0339. The Fourth District, in its decision below, ultimately consolidated all of the appeals herein, but subsequent to the preparation of separate records on appeal.

> 3. Section 817.234(1) is unconstitutionally vague, with respect to its reference to insurance claims containing "incomplete" information.
>
> 4. Section 817.234(1) improperly criminalizes the mere submission of an "incomplete" claim.
>
> 5. The insurance fraud statute is unconstitutional unless it provides for reciprocal, automatic and full disclosure by the insurance company.

(2R. 209, 213, 221, 228, 235, 238). A subsequent motion to dismiss, filed on December 27, 1990, added additional arguments which were to be reiterated throughout the trial court proceedings:

> 1. Medical reports which were omitted from the submission to the insurance company were protected by the statutory privilege of confidentiality of medical records, under section 455.241, Florida Statutes.
>
> 2. Omitted medical reports were protected by the work-product doctrine and could not be the basis for an insurance fraud prosecution,

(2R. 615, 626, 637). The defendants' arguments were predicated on the premise that the insurance fraud statute required full disclosure of all medical reports.

The Honorable John Ferris, Circuit Judge, heard legal arguments on these claims on August 16, 1991. (2R. 2035-2135). At that hearing, defense counsel made clear the basis for the defense's legal arguments regarding the insurance fraud statute:

> Now, the insurance fraud statute . . . merely says if you want to voluntarily settle your claim you must give your adversary all your medical records.

(2R. 2055; see also, 2R. 2044). The State emphatically responded that the insurance fraud statute did not require automatic disclosure of anything; it only prohibited concealment, in conjunction with an incomplete claim, when an omission was coupled with an intent to defraud. (2R. 2068). At this hearing, the parties discussed: the alleged conflict between section 455.241 and section 817.234; the relation of the work-product doctrine to the insurance fraud statute; the statute's alleged encroachment on the Supreme Court's rule-making powers and regulation of conduct of attorneys; and other related matters. Defense attorneys also argued that the insurance fraud statute did not apply to attorneys, because attorneys, in not revealing matters to the insurance company, were simply acting in a customary manner, in accordance with the teachings of experts and continuing legal education seminars. (2R. 2090-2100).

At that hearing, Judge Ferris emphasized that no conduct violated the insurance fraud statute in the absence of an intent to defraud. (2R. 2100). He also deemed strained a construction of section 817.234(1), which asserted that the subsection did not apply to attorneys, insofar a3 that subsection referred to "any person" who committed certain acts with an intent to defraud. (2R. 2100).

Judge Ferris entered a written order, filed on September 3, 1991, rejecting the various claims of the defendants. (2R. 1081). That order stated the following:

> . . . the court finds that s. 817.234(1) applies to all persons, including attorneys, who, with fraudulent intent, submit false, incomplete or misleading statements to insurance companies as part of or in support of a claim. The court further finds that s. 817.234(1) applies to the insurance claims process before suit is filed, and that the statute does not invade the exclusive jurisdiction of the Supreme Court to regulate members of the bar, or to enact rules relating to judicial practice and procedure.
>
> The Court recognizes that while it may have been preferable for the legislature to have defined the term 'incomplete' in the challenged statute, this does not render the statute unconstitutionally vague. The court finds, under the facts and circumstances of these counts, that the element of specific intent required under s. 817.234(1) lends 'sufficient clarity to provide adequate notice of the proscribed activity to persons of

> ordinary intelligence and understanding.' [citations omitted].
>
> The court rejects defendants' argument that the statute requires a claimant to include all 'statements', as defined by subsection (6) of s. 817.234, with a claim fox payment or other benefit to an insurance company, whether or not privileged or otherwise confidential at the time. What the statute prohibits is the willful omission, with specific fraudulent intent, of information concerning facts or things material to the claim.

(2R. 1082-83). The order also proceeded to reject defense arguments based on reciprocal discovery and privacy arguments. Id. In a separate written order, Judge Ferris rejected the defense arguments which were based on claims of confidentiality or privilege under section 455.241:

> . . . The court finds that s. 817.234(1) does not require the automatic and complete disclosure of all the claimant's medical records, whether or not privileged, but merely prohibits a claimant from presenting, with fraudulent intent, false, incomplete or misleading information to an insurance company. The court further finds that s. 455.241(2) does not create a privilege in medical reports as that term is generally understood, see, 90.501, Florida Statutes, and does not apply in any event to medical records which are already in the hands of a patient or his legal representative. There is no conflict under the facts and circumstances of this case.

(2R. 1727).

After the entry of Judge Ferris' written orders, the defendants sought clarification or rehearing regarding the interrelation of the insurance fraud statute, section 455.241 and the work-product doctrine. (2R. 1108-12, 1113-18). At a hearing on October 17, 1991, Judge Ferris stated that "[n]othing in the court's order upholding the constitutionality of 817.234 abrogated work product OK attorney/client, " (2R. 2234). He embellished upon this:

> All I have said is that 817.234 is constitutionally valid and facially is valid and is designed to cure a stated ill in the statute and is validly done. That's all that I've said. And you keep leaving out the essential predicate of that statute. And that is everything must be proved to be done with an intent to defraud. It isn't that he leaves out a certain report or he doesn't give a certain receipt or something like that. That could be done very harmlessly and so that could be corrected. But if he does it with the intent to defraud that insurance company then he has violated in fact 817.234. . . .

(2R. 2236-37).

Subsequent motions to dismiss included modified versions of prior arguments. For example, in the motion filed on November 24, 1992, the defendants argued that:

1. The insurance fraud statute does not give attorneys fair warning of the consequences of exercising the attorney-client privilege, including the work-product privilege.

2. The statute creates confusion over what constitutes the proper exercise of the work product doctrine.

3. Customary practices of personal injury attorneys preclude application of the insurance fraud statute to them.

4 Requiring attorneys to prove documents are properly withheld, under the work-product doctrine or attorney-client privilege, would be an impermissible shifting of the burden of proof.

5. It is improper for a jury to decide what is protected by the work-product or attorney-client privileges.

(2R. 1244-90). In another motion to dismiss, filed December 29, 1992, the defense argued that there was a conflict between the insurance fraud statute and PIP statute. (R. 68, 76-78). The essence of this argument was that under the PIP statute, if a claimant requests and receives the insurer's doctor's report, the insurance company is then entitled to every report from the claimant, yet, according to the defense, under s. 817.234, the claimant was obligated to turn over all medical reports as soon as the **claim** is submitted. This motion also included arguments based on fair notice to attorneys, arbitrary enforcement by prosecutors, and statutory conflicts. These arguments presented

variations of the theme that attorneys would not realize that the statute compelled them to disclose various documents during the course of their dealings with insurers.

In 1993, the Fourth District Court of Appeal, in case no. 93-867, disqualified Judge Ferris from proceeding with this case. Circuit Judge Robert Andrews replaced him. The defendants immediately sought reconsideration of all of Judge Ferris' rulings regarding the constitutionality, scope and application of section 817.234, Florida Statutes. (2R. 1523, 1535, 1539). Various motions to dismiss were filed in July, August and September, 1993, reraising issues which had been presented in prior motions. (2R. 1547, 1575, 1647, 1779).

In a Motion to Dismiss the Predicate Acts of Count 1, counsel for Mark Marks, P.A., on July 21, 1993, again asserted that the insurance fraud statute conflicts with the PIP statute, regarding disclosure of medical reports to an insurer; and that the insurance fraud statute violates the due process principles relating to fair notice, arbitrary enforcement and reliance, (R. 97). Counsel for both the defendant and the State filed memoranda of law regarding this motion. (R. 115, 124, 225, 235).

At a hearing on August 20, 1993, Judge Andrews, sua sponte, presented his own theory regarding the problem of the insurance fraud statute. According to Judge Andrews, since the

unfair claim settlement statute, section 626.945(1), required an insurer to notify an insured of any additional information needed for processing the claim, the insurance fraud statute could not apply to a first-party insured (the party holding the insurance policy), with respect to the submission of a fraudulent, incomplete claim. (2R. 2453-54; 2484; 2455-56). At this hearing, the judge also grilled the prosecution regarding several extensive hypothetical scenarios, which the judge had developed prior to the hearing, and which the parties did not have advance notice of. (2R. 2449, 2451, 2463, 2478).

After this hearing, the parties submitted extensive memoranda of law, addressing issues raised by Judge Andrews, as well as other matters. The State's memorandum argued that:

> 1. The insurance fraud statute does not require automatic, absolute disclosure.
>
> 2. First party claimants can commit insurance fraud by fraudulent omissions.
>
> 3. A demand letter submitted by an attorney constitutes a claim under the insurance fraud statute.

(2R. 1808, 1814, 1829, 1832). Counsel for Mark Marks, P.A. submitted a memorandum of law which argued the following:

> 1. The information does not allege a violation of section 817.234(1) because the defendant had no independent legal

duty to disclose information which was allegedly concealed and therefore cannot be criminally liable for presenting "incomplete" information.

2. Section 817.234(1) applies only to first party claims, not to third party claims.

3. Section 817.234(1) does not apply to attorneys submitting demand letters to insurers.

4. An attorney's demand letter is not a "statement" under the insurance fraud statute.

5. Differential treatment of insureds and claimants under the insurance fraud statute results in a violation of the equal protection clause.

(2R. 1846, 1851, 1862, 1866-67).

Several of the issues were argued before Judge Andrews at another hearing, on September 27, 1993, (2R. 2489-2588). At this hearing, defense attorneys argued the following:

1. There is no violation of section 817.234 for counts charging incomplete information in insurance claims because there is no independent legal duty to disclose the information allegedly concealed. (2R. 2494-2508).

2. The insurance fraud statute applies only to first-party claims, not to third party claims. (2R. 2514). This argument was based on the contention that claims forms are used in first-party claims, but not in third-party claims.

3. If the statute includes third-party claims, there is an equal protection problem. (2R. 2543).

4. The insurance fraud statute is vague with respect to its interrelation with the work product doctrine. (2R. 2561).

At the conclusion of the hearing, the judge asked the parties to submit summaries of the various counts of the information. (2R. 2585). Such summaries were provided by the State and defense. (2R. 1922, 1932). The State also submitted an extensive memorandum of law, addressing issues raised in the various memoranda previously filed by the defense. (2R. 1940-61).

On October 15, 1993, an order was filed, pursuant to the defendants' motion for reconsideration. (2R. 1962-82). This order dismissed all counts of the information (and predicate acts of the RICO count) which involved third-party claims. (2R. 1981). The primary reasoning of this order was that section 817.234(1) was vague, insofar as personal injury attorneys representing injured third parties would not interpret the statute as applicable to their actions, (2R. 1966). The order then proceeds to embellish upon this, by explaining why section 817.234(1) applies only to first-party claims and not to third-party claims. (2R. 1967-74).

That order also found, in the alternative, that personal injury attorneys would not have reason to believe that

the proscriptions of the insurance fraud statute applied to them:

> Assuming arguendo 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 its 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 statute.

(2R. 1976-77). In support of this latter proposition, the court relied on various publications which advise personal injury attorneys to withhold unfavorable materials from insurers. The court rejected the State's contention that the specific intent to defraud, required by the statute, cured any possible vagueness problems:

> In the case sub juclice, 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 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 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 light of the statute's language that third party attorneys would know that they are to be included within the [sic] 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.

(2R. 1978-79). Based on the foregoing analysis, the trial court, in the October 15, 1993 order, dismissed multiple counts of the information. That order was appealed to the Fourth District Court of Appeal, in case no. 93-3259.

On January 27, 1994, Judge Andrews entered another order, dismissing counts 20 and 21, and predicate acts R and S of count 1. (R. 246-57). Judge Andrews defined the issue which was being addressed in that order:

> The issue which this Court must confront is whether [an] attorney can reasonably be expected to know that omitting an unfavorable medical report violates the statute because it constitutes an incomplete statement with the intent to injure, defraud or deceive the insurance company.

(R. 250). The court found that the portion of the insurance fraud statute referring to "incomplete statements" submitted to insurers, did not apply to attorneys:

> In light of the heavy emphasis placed on the attorney's duty to

> represent his client's interest, the statute does not provide sufficient notice to attorneys. This application of the statute ignores the fact that the average personal injury attorney does not view the withholding of medical reports, or any information unfavorable to his client, as inappropriate, much less criminal. The attorney's duty to zealously advocate his client's position within the adversarial system is so entrenched that any modification of it must be wrought clearly and unambiguously. If the legislature intended to reach such conduct, its failure to declare it explicitly renders the statute's criminalization of fraudulent omission as unconstitutional as applied to the attorney-client context.

(R. 251). The court's reasoning was based, in part, on the notion that a failure to disclose can be fraudulent only if there is a duty to disclose, and no such duty was found to exist herein:

> In the instant case, the lack of either an explicit requirement to disclose all information to the insurance companies or a fiduciary relationship suggests that the legislature would not embark on such a departure from general legal principles without providing more notice. Attorneys, especially, are uniquely aware that an omission is not actionable without a corresponding duty to disclose. Therefore, an attorney, in an adversarial position with the insurance company, would never suspect that omission would result in a charge of fraud.

(R. 252). The court continued with this theme:

> As this Court stated in its prior order, it is part of custom and practice of personal injury attorneys in the pre-suit investigation stage of litigation for an attorney to emphasize the strengths of his case and downplay the weaknesses. Legal scholars and treatises advise attorneys to be selective about the medical information disclosed at this stage of the litigation. Is this effective advocacy or a fraudulent omission violative of F. S. s. 817.234(1)?
>
> In applying this statute to attorneys, an attorney's conduct is potentially fraudulent any time the attorney withholds any material information from the insurance company. This is true precisely because of the scienter language included in the statute. The insured's attorney always attempts to better his client's position vis-a-vis the insurance company, to either settle for the greater amount conceivably possible, or seek the highest award possible from a jury. In so doing, the practice of marshaling a set of facts to obtain a large settlement can be construed as deceiving the insurance company or injuring the company's financial position. Certainly, the requisite intent will always be present as attorneys are paid to act tactically and strategically.

(R. 253-54). Thus, the court concluded that the statute was unconstitutionally vague, with respect to fraudulent omissions, "as applied to attorneys engaged in the representation of their clients." (R. 256). As a result, predicate acts R and S of count 1, and counts 20 and 21, were dismissed. The judge's

determination that these counts involved allegations regarding attorneys submitting incomplete claims derived from the summaries of charges furnished by both the State and defense, in response to the judge's prior request for such information. (2R. 2585, 1922, 1932).

Three interrelated appeals were taken to the Fourth District Court of Appeal. That Court addressed the following question, which was common to all three of the appeals, which appeals the Fourth District consolidated for review: "whether section 817.234(1), Florida Statutes (1987), is unconstitutionally vague as applied to attorneys in representation of their clients." (App. 2).[3] That general issue led to two distinct holdings by the Fourth District. First, that Court concluded "that the legislature intended the insurance fraud statute to apply to third party claims," thereby reversing the trial court on that issue. (App. 2). Second, the Court concluded "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. . . ." (App. 2).

[3] As of the drafting of this Brief of Petitioner, counsel for the Petitioner has not received an Index to the Record on Appeal which the Fourth District Court of Appeal is transmitting to this Court. The Appellant presumes that the record transmitted by the lower Court will include that Court's opinion at the end of the transmitted record. Thus, references to the lower Court's opinion are referred to herein as they appear in the Appendix to the Brief of Petitioner.

The Court subsequently summarized this portion of its decision, regarding attorneys who submit incomplete claims to insurers:

> 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 companies prior to a trial. The specific 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,'

(App. 14). In reaching this conclusion, the lower Court emphasized that attorneys operate under different rules than non-attorneys when the attorneys are acting as advocates. Thus, the lower Court predicated its decision, in part, on factors such as the confidential relationship which exists between attorneys and clients, "which includes constraints upon information that can be disclosed to others"; discovery rules, which apply subsequent to the filing of a lawsuit, which exclude work-product from compelled disclosure; medical reports, which need not be disclosed in civil litigation "absent a request for

such"; disclosure of medical records in personal injury protection claims, which is mandated by statute only after a request by the insurer; and rules of confidentiality of medical records. (App. 7-8). The lower Court bolstered its reliance on the foregoing by emphasizing various Continuing Legal Education course materials which emphasize that in personal injury cases, attorneys for claimants are not obligated to disclose unfavorable materials to the insurers. (App. 8, at n. 3).

The court then proceeded to reject the State's argument that the statutory element of an intent to defraud avoided the dilemmas which the Court had focused on. (App. 9-10). Thus, the Court concluded that "[t]he state is trying to use the intent language to make definite that which is undefined in the insurance fraud statute." (App. 11). The Court was also troubled by the concept of an "incomplete" claim in "the absence of a duty to disclose the information." (App. 12). The Court's opinion appears to be saying that there is no duty to disclose, and if there is no duty to disclose, the claim can not be incomplete:

> Another troublesome aspect of applying criminal sanctions for fraud against an attorney in an adversarial position for filing an "incomplete" claim is the absence of a duty to disclose the information. The trial court found, and the state concurs on appeal, that the insurance fraud statute does not create a duty of full

> disclosure. A fraud is committed for the failure to disclose material only when there is a duty to disclose such; and such duty arises when one party has information that the other party has a right to know because of a fiduciary or other relation of trust or confidence between them. Chiarella v. United States, 445 U.S. 222, 10-0 S.Ct. 1108, 63 L.Ed. 2d 348 (1980).

(App. 12). The statute's requirement of materiality did not save the statute because "[t]he lack of guidance as to what constitutes an 'incomplete' claim when an attorney is dealing with an insurance company in an adversarial context, is the root of the evil." (App. 13).

Pursuant to the State's Motion for Rehearing/Certification, the lower Court certified to this Court the following question of great public importance:

> WHETHER SECTION 817.234(1), FLORIDA STATUTES (1987), IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO ATTORNEYS IN THE REPRESENTATION OF THEIR CLIENTS SINCE IT DOES NOT PROVIDE ADEQUATE NOTICE OF WHEN AN OMISSION WILL RESULT IN AN "INCOMPLETE" CLAIM UNDER THE STATUTE.

(App. 26).

QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT SECTION 817.234(1), FLORIDA STATUTES, IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO ATTORNEYS, WITH RESPECT TO SUBMISSIONS OF INCOMPLETE CLAIMS TO INSURERS, WHEN SUCH SUBMISSIONS ARE COUPLED WITH AN INTENT TO DEFRAUD.

SUMMARY OF ARGUMENT

The lower Court's opinion concludes that section 817.234(1), Florida Statutes, cannot apply to attorneys who submit "incomplete" claims to insurance companies. The concerns of the lower court, that routine conduct which attorneys regularly engage in should not be treated as criminal, is effectively dealt with by the statute itself, as the statute requires the specific intent to defraud. No attorney can intentionally withhold material information from the insurer when the attorney does so, knowing that the attorney has the intent to defraud, as the attorney is attempting to obtain for the attorney's client that to which the attorney knows the client has no legal entitlement, and further knows that the omitted materials repudiate the claim. Attorneys have no right, either under the statutory laws of this State, the rules of discovery, or the Rules Regulating the Florida Bar, to commit any acts, when those acts are accompanied by an intent to defraud.

ARGUMENT

THE LOWER COURT ERRED IN CONCLUDING THAT SECTION 817.234(1), FLORIDA STATUTES! IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO ATTORNEYS.

Section 817.234(1), Florida Statutes, prohibits "any person" from committing insurance fraud. Its proscriptions apply to "[a]ny person who, with the intent to injure, defraud, or deceive any insurance company . . . [p]resents 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. . . ." (emphasis added), [4]

Florida is among a growing number of states which have prohibited fraudulent omissions from insurance claims. Alaska, Connecticut, Delaware, Idaho, Indiana, Louisiana, Nevada, New Hampshire, and Pennsylvania all prohibit the submission of "incomplete" information to insurance companies. [5] Arkansas

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[4] The full text of the statute is included in the Appendix to the Brief. (App. 27).

[5] Alaska Stat. s. 21.36.360(b)(2) & (3) (1991 & 1992 supp.); Conn. Gen. Stat. Ann. s. 53A-215 (1985 & 1993 Supp.); Del, Code Ann., Title 11, s. 913 (1987 & 1992 Supp.); Idaho Code Ann., s. 41-1325 (1991); Ind. Stat. Ann. s. 35-43-5-4 (10) (Burns 1992 Supp.); La. Rev. Stat, Ann. s. 22:1243A (1993 Supp.); Nev. Rev. Stat. s. 686A.291 (1991); N.H. Rev. Stat. Ann. s. 638.20 (1992 Supp.).

prohibits concealing or withholding material information.[6] Ohio defines "deceptive" as including withholding information and omissions.[7] Nevada and New Jersey bar concealing or knowingly failing to disclose material events.[8] Colorado, Kansas, New York and Missouri prohibit concealing with the intent to mislead.[9] Thus, omissions from insurance claims are routinely rendered criminally fraudulent if the omission is both material to the claim or the omission is coupled with an intent to defraud.

The statutory prohibition at issue applies to "any person." The statute does not state that it applies to "any person except an attorney." General rules of statutory construction compel the conclusion that the term "any person" was intended to apply to attorneys. The intent of the legislature is the paramount consideration. Lloyd Citrus Trucking, Inc. v. State Dept. of Agriculture, 572 So. 2d 977 (Fla. 4th DCA 1990). The words used are the best evidence of this legislative intent where they are plain and unambiguous. City of Delray Beach v. Barfield, 579 So. 2d 315 (Fla. 4th DCA

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[6] Ark. Code of 1987 Ann., s. 23-66-301(3) (1987).

[7] Ohio Rev. Code Ann., Title 29, s. 2913.47(A)(2) (Baldwin 1992).

[8] Nev. Rev. Stat. s. 686A.291 (1991); N.J. Stat. Anno. s. 17-33A-4(3) (1985 & 1993 Supp.).

[9] Colo. Rev. Stat, s. 10-1-127(1) (1987 & 1992 Supp.); Kan. Stat. Ann. s. 40-2-118 (1986); N.Y. Penal Law, s. 176.05 (McKinney 1988); Mo. Stat. s. 375.991(1) (Vernon 1991 & 1993 Supp.).

1991). When reading a statute, a court should give the language its plain and ordinary meaning. Lloyd Citrus Trucking, supra.

The principal reason for the lower Court's conclusion that the statute does not adequately notify attorneys that they are subject to the prohibition against fraudulent submissions of incomplete claims is that attorneys who represent claimants against insurance companies, by virtue of various aspects of their professional training, education, ethical canons, and discovery rules, are effectively trained that it is permissible for them to refrain from disclosing unfavorable materials to insurers. The state does not dispute the propriety of nondisclosure in the situations referred to by the lower Court. The State does not assert that nondisclosure in those situations is going to fall within the ambit of section 817.234's penal proscriptions. The critical failure of both the lower Court and the trial court, is the failure to recognize the significance of the statutory element of the intent to defraud. Very simply, the acts referred to in the lower Court's opinion are acts which permit nondisclosure by attorneys because they are typically acts in which there is no intent to defraud the insurer. No attorney has the right, either by statute, rule of Court, or the Rules Regulating the Florida Bar, to engage in a conscious effort to defraud an insurer. Thus, when an attorney's acts of nondisclosure are coupled with an intent to defraud, none of the theories upon which the lower Court relies can save attorneys

from the same penal proscriptions which apply to all other members of our society. An attorney can not rely on a claim of work product as an excuse for nondisclosure to the insurer when the attorney's submissions to the insurer are coupled with an intent to defraud. An attorney has no right, under the Rules Regulating the Florida Bar, to attempt to defraud an insurer, by pursuing a claim which the attorney knows is repudiated by materials which the attorney has chosen not to disclose. Thus, the intent to defraud is the linchpin of the statute and, when that specific intent is properly considered, and the statute's scope is then clearly understood, the lower Court's concerns will easily be seen to be imaginary,

The insurance fraud statute does not require automatic disclosure of all materials. Nondisclosure is proscribed only when there is an intent to defraud, deceive or injure the insurer. Intent to defraud connotes the intent to deprive someone of money or property in a transaction by cheating and involves "the deprivation or withholding from another that which justly belongs to or is due him" City of St. Petersburq v. Jewell, 489 So. 2d 78, 79 (Fla. 2d DCA 1986), quoting State v. Clayton, 110 So. 2d 111, 114 (La. 1959). Critical to an intent to defraud is the effort to induce another party to rely on the first party's fraudulent assertion or omission, to the second party's detriment. Lance v. Wade, 457 So. 2d 1008, 1009 (Fla. 1984). Thus, an attorney's efforts to obtain from an insurer

that to which the attorney's client has a reasonable legal entitlement, based upon facts which the attorney reasonably believes to exist, are going to involve situations in which the attorney is not engaging in an effort to defraud the insurer, as the attorney is seeking only to get that to which the client is reasonably believed to be entitled.

The intent to deceive includes both statements which are false, and those which are made with a reckless disregard of the truth. United States v. White, 765 F. 2d 1469 (11th Cir. 1985). The intent to deceive, much like the intent to defraud, similarly connotes an effort to induce detrimental reliance by another party. Atilus v. United States, 406 F. 2d 694 (5th Cir. 1969); Ashland Oil Co., Inc. v. Pickard, 269 So. 2d 714, 720-21 (Fla. 3d DCA 1972). In the context of insurance claims, this typically means that an insurer is not being induced into detrimental reliance when the attorney is seeking only to obtain that which the insurer is lawfully obligated to pay under the terms of the controlling insurance policy.

An intent to injure likewise refers to an effort to induce detrimental reliance. "In jury" includes any damage or wrong done to another's rights or property. United States Fidelity & Guarantee Company v. Mayor's Jewelers of Pompano, Inc., 384 So. 2d 256, 258 (Fla. 4th DCA 1980). All of the foregoing intents, which are an essential element of insurance

fraud, are inconsistent with a good faith effort by an attorney to obtain that which he or she reasonably believes a client is entitled to. A few hypothetical scenarios should help to elucidate the distinctions and the crucial nature of the state of mind in any particular case.

In the first scenario, the attorney's client was treated by a doctor who found evidence of an injury, and wrote up a report reflecting the scope of the injury. Upon further consideration, the doctor discovered that the prior conclusion was erroneous and issued a revised report. The attorney, in presenting the claim to the insurance company, presented only the initial report and concealed the existence of the second report. The attorney did not have any other medical evaluations upon which to base a belief in the existence of any injuries. Under the lower Court's decision, this attorney could not be prosecuted for insurance fraud, even if the attorney concealed the corrected report, hoping that the insurance company might nevertheless offer a settlement to get rid of the case.

In the second scenario, the only medical evaluation ever received by the attorney reflected that a client had no injuries. The attorney submitted a written insurance claim, concealing the existence of that report. The attorney had no other basis for any good faith belief that any compensable injuries existed. The foregoing scenarios involve situations

where the concealment of adverse information was coupled with the absence of any good faith basis for believing that an insurance claim was viable. Once again, using the reasoning of the opinion under review, the attorney committed no crime.

The attorney's state of mind and intent were therefore significant and suggested the existence of the intent to defraud or deceive by the act of concealment. On the other hand, a non-disclosed evaluation might be but one of five written evaluations, where the other four reports are disclosed, all four support the existence of legitimate injuries, and all four indicate a factual basis upon which the attorney could in good faith believe that the adverse evaluation was erroneous. In cases where there are conflicting evaluations, nondisclosure generally will not constitute **fraud, where** there is a good faith basis for believing that the favorable reports are accurate. However, if the attorney has cause to know that the favorable reports are not legitimate, nondisclosure **of adverse reports** might still reflect an intent to defraud. [10]

In view of the foregoing, the intent to defraud narrowly circumscribes the types of situations, involving

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10 Such situations might arise where an attorney knows that a report was favorable only because the client failed to give the doctor complete and accurate background information. Similarly, the favorable reports might be the product of a doctor willing to sign off on anything submitted and prepared by the attorney.

nondisclosure of material facts by an attorney, which will be subject to the criminal proscriptions of the insurance fraud statute. These will typically be either frivolous cases, which the attorney knows, or should know, to be frivolous; or distinctive, frivolous aspects of cases, where other distinctive aspects of the case are legitimate, but a particular aspect of the case, which is pursued by the attorney, is similarly known by the attorney to be without merit.

The statutory linkage of nondisclosure with the intent to defraud is fully consistent with the Rules Regulating the Florida Bar. Under Rule 4-1.6(b), a lawyer must reveal information "to the extent the lawyer believes necessary . . . (1) to prevent a client from committing a crime. . . ." Similarly, pursuant to Rule 4-4.1, "in the course of representing a client a lawyer shall not knowingly: . . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6." This Court, recognizing the same principle, has emphatically stated that "the perpetration of a fraud is outside the scope of the professional duty of an attorney and no privilege attaches to a communication and transaction between an attorney and client with respect to transactions constituting the making of a false claim or the perpetration of a fraud." Kneale v. Williams, 30 So. 2d 284, 287 (Fla. 1947). See also,

Anderson v. State, 297 So. 2d 871 (Fla. 2d DCA 1974); Pearlman v. Pearlman, 425 So. 2d 666, 666 at n. 1 (Fla. 3d DCA 1983). If the perpetration of a fraud is beyond the scope of an attorney's professional duties, it would necessarily follow that a statute, which contains **an** intent to defraud as an element, cannot possibly be proscribing any conduct which an attorney has any reasonable basis to engage in by virtue of legal education, professional training, court-promulgated procedural rules of discovery, or canons of ethical responsibility.

Having generally addressed the significance and scope of the insurance fraud statute and the intent to defraud, it is necessary to turn to an evaluation of some of the more specific concerns of the lower Court, and some of the lower Court's justifications for refusing to apply the statute to attorneys who conceal material information, with the intent to defraud:

A. Continuinq Leqal Education Materials

The lower Court gave credence to the argument that nondisclosure by an attorney, of material information, is permissible, even when coupled with an intent to defraud, by virtue of the training that lawyers receive in Continuing Legal Education courses. (App. 7-8, 11-12). The Court concluded that the State "dismisses the continuing education lectures and publications advocating withholding of information by asserting

that in these circumstances, "there is no intent to defraud, However, how does the state know such?" (App. 11-12). The State "knows such," because, as previously indicated, both this Court and the Rules Regulating the Florida Bar make it clear that efforts to defraud are not within the scope of a lawyer's professional duty. See, Kneale, supra; Rules 4-1.6(b); 4-4.1. In view of such constraints, it can reasonably be assumed that when CLE lecturers are advising personal injury attorneys that it is permissible to withhold unfavorable materials, such advice is being given with the assumptions that (a) the attorney does have a legitimate basis for believing the existence of the asserted claim; and (b) the attorney, by pursuing what the client is reasonably believed to be entitled to, is not acting with the intent to defraud.

However, let's assume for the moment that the Fourth District is correct and that the State does not "know such"; that the State does not know that the CLE materials are predicated upon the notion that an intent to defraud is lacking. That would not make a difference. It is necessary to follow the absurd and repugnant implications of the lower Court's decision to their inevitable and pathetic conclusion. Assume for the moment that CLE lecturers are actually advising personal injury attorneys that they can withhold any unfavorable materials from insurers, even when they are acting with the intent to defraud. Could such advice from CLE lecturers actually constitute a

justification for refusing to apply a statute, promulgated by a democratically elected legislature, to attorneys. The Fourth District's decision effectively vests CLE lecturers, whose course materials are not subject to any form of review by this or any other Court, with a veto power over the democratically elected legislature. After all, if the CLE lecturer says so, that must be the law and that must exempt attorneys from the constraints of an otherwise applicable statute. Thus, when a CLE lecturer, advising a group of young attorneys on the ways in which to develop a new practice, tells those attorneys that it is permissible to retain hit men to rough up those clients who don't like to pay their bills, the lower Court would obviously come to the conclusion that the well-educated attorneys who have heard such advice could rely on it, and then assert such advice as a defense to the applicability of assault and battery statutes to attorneys. Having effectively given the CLE lecturer a form of veto power over the legislature, the lower Court's opinion shows little respect for the elected legislature, and even less for the public, which is apparently condemned to tolerate attorneys who, with the intent to defraud, conceal material information from insurers.

B. Work Product and Attorney-Client Confidentiality

The lower Court suggests that the work-product doctrine and principles of attorney-client confidentiality

preclude the application of the insurance fraud statute to attorneys who fail to disclose material information. For the reasons previously enunciated, such reasoning is totally inapplicable when the attorney is acting with the intent to defraud. The attorney-client privilege is inapplicable in the context of an effort of the attorney to perpetrate a fraud. Kneale, supra. The same principles would apply in the context of the work-product doctrine.[11] Furthermore, such contrasts between asserted privileges and nondisclosure by counsel posit a false dichotomy. The attorney need not choose between privileges and work product, on the one hand, and nondisclosure of material information on the other hand. The attorney need only refrain from submitting fraudulent claims to the insurer in the first place. If the attorney submits a claim which can reasonably be perceived as having a meritorious basis, nondisclosure of work-product, attorney-client communications, etc., is not going to be prohibited, as it will not have an intent to defraud. Nondisclosure, under those circumstances, will not be subject to criminal prosecution.

C. Medical Reports/Medical Records Confidentiality

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[11] See also, United States v. Zolin, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed. 2d 469 (1989) (crime-fraud exception to attorney-client privilege and work-product doctrine); In Re Doe, 662 F. 2d 1073 (4th Cir. 1981) (crime fraud exception abrogates attorney-client and work-product privileges).

To whatever extent any alleged medical records privilege exists, it is a privilege which, at most, would extend to medical personnel having custody of the records. See, Adelman Steel Corp v. Winter, 610 So. 2d 494, 501 (Fla. 1st DCA 1992) (section 455.241 "makes confidential and protects a patient's records and other medical information from disclosure by the patient's health care practitioner. . . ." (emphasis added)); West v. Branham, 576 So. 2d 381 (Fla. 4th DCA 1991) (section 455.241 confidentiality applies only to treating physicians). Thus, such confidentiality privileges do not extend to medical records which an attorney has already obtained. If the client and the attorney wish to preserve such allegedly "confidential" matters, the attorney can simply refrain from submitting any claim to the insurers, if the omitted "confidential" matters demonstrate the fraudulent nature of the claim. Keep it confidential by not pursuing a fraudulent claim. Cf., Nicholson v. Kellin, 481 So. 2d 931, 936 (Fla. 5th DCA 1985) ("even assuming that a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, if he undertakes to do so he must disclose the whole truth.").

Similarly, while medical reports are not discoverable during the course of civil litigation absent a request for such, Fla. R. Civ. P. 1.360(b), such rules of procedure, for reasons previously detailed herein, do not provide cover for an attorney

acting with the intent to defraud. Indeed, in the context of in-court litigation, Rule 4-3.1 of the Rules Regulating the Florida Bar, further provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." As the lawyer must have a valid basis for bringing or defending the action in the first place, it therefore necessarily follows that when the attorney does not disclose a medical report, such nondisclosure, being predicated upon a valid, nonfrivolous basis for the underlying claim, lacks an intent to defraud. For similar reasons, the requirement of section 627.736(7)(b), Florida Statutes, that medical records related to PIP claims be disclosed only upon request by the insurer, does not, in any way, justify nondisclosure, in the absence of such a request, when that nondisclosure is coupled with an intent to defraud by an attorney who knows that the nondisclosed records conclusively refute the PIP claim.

All of the foregoing arguments not only demonstrate the significance of the intent to defraud, as it truly narrows the potential scope of the penal statute, but, they demonstrate the false nature of the lower Court's professed concerns. The foregoing is further consistent with the applicable case law regarding the significance of the intent to defraud; case law which the lower Court has evaluated improperly.

Many courts have held that the presence of "specific intent" language in a penal statute is virtually dispositive of any claim that the statute is void for vagueness. In Colautti v. Franklin, 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed. 2d 596 (1979), the United States Supreme Court said: "This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." See also, Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed. 2d 362 (1982) ("And the Court has 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."); United States v. United States Gypsum Co., 438 U.S. 422, 434-36, 98 S.Ct. 2864, 57 L.Ed. 2d 854 (1978) (sustaining federal criminal antitrust statute requiring mens rea); Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972) (declaring general intent vagrancy statute unconstitutionally vague because it lacked specific intent requirement); Screws v. United States, 325 U.S. 91, 101-03, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (upholding validity of criminal statute prohibiting willful deprivation of rights on account of race); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502-03, 45 S.Ct. 141, 69 L.Ed. 402 (1925) ("since the statute requires a specific intent to defraud in order to encounter their prohibitions, the hazard

of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement."). The Supreme Court, in Screws, explained:

> But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

325 U.S. at 102.

This Court has expressly followed this rule of law. State v. Joyce, 361 So. 2d 406 (Fla. 1978). In Joyce, this Court was asked to analogize a statute proscribing willful child neglect to an unconstitutionally vague statute that forbade "negligent treatment of children." Id. at 407. The Court refused to do so and held:

> The basis for our holding there was that the negligent treatment statute made criminal acts of simple negligence - conduct which was neither willful nor culpably negligent. Section 827.04(2), in contrast, requires willfulness (scienter) or culpable negligence. . . ,

> As we recently concluded in upholding Section 784.05, Florida Statutes 1975, the culpable negligence statute, the **term** "culpable negligence" does not suffer from the constitutional infirmity of vagueness. Further, the United States Supreme Court has often upheld a statute claimed to be unconstitutionally vague because scienter was an element of the offense. . . . The requirement of willfulness (scienter) or culpable negligence in Section 827.04(2), therefore avoids the infirmity found in Winters with respect to Section 827.05 - that unintentional acts or conduct which is not the product of culpable negligence might be proscribed by the statue.

361 So. 2d at 407.

It is well settled that where a statute requires a specific criminal intent, there can be no objection that the defendants did not have notice of the proscribed conduct. See, United States v. Bohonus, 628 F. 2d 1167, 1174 (9th Cir. 1980), cert. denied, 447 U.S. 928 (1980) ("mail fraud is **a** specific intent crime. The prosecution must prove that the defendant engaged in his actions with the intent to defraud his employer. . . . The defendant **cannot,** then, maintain that he was unaware of the offense."); see also, United States v. Stewart, 872 F. 2d 987 (11th Cir. 1989); United States v. Canner, 752 **F**. 2d 566 (11th Cir. 1985). Any argument that the insurance fraud statue does not give defendants notice of what is proscribed is thus incorrect.

Not only does the statute require the intent to defraud, but, it also requires knowledge that a submitted claim be false or incomplete as to a "material" fact.[12] This, in effect, creates a "double scienter" requirement, highly analogous to the statute at issue in Hygrade, supra, where the defendants were prosecuted for knowingly selling nonkosher meat as kosher, with the intent to defraud. 266 U.S. at 501.

The lower Court's opinion (App. 9-10), seeks to avoid the significance of the statutory element of the intent to defraud by relying on cases such as State v. DeLeo, 356 So. 2d 306 (Fla. 1978), and State v. Rou, 366 So. 2d 385 (Fla. 1978). Those cases, however, do not support the lower Court's conclusion. Those cases involve situations where the statutory language describing the specific intent was itself vague. Thus, a vague specific intent could not save the statutes at issue. For example, the statute in Rou prohibited the use of an official position to secure privileges or exemptions for himself or others. The statutory intent - i.e., "to secure privileges ok exemptions," was deemed unconstitutionally vague as it had no guidelines. Similarly, in State v. DeLeo, 356 So. 2d 306 (Fla. 1978), the statue criminalized "official misconduct" by tying

[12] The lower Court accepted that attorneys would readily be able to identify "material" facts when negotiating with insurers. (App. 12).

that conduct to a "corrupt intent," and the phrase "corrupt intent" was deemed the source of the unconstitutional vagueness.

BY contrast, the statutory intent language in the insurance fraud statute - i.e., the intent to defraud, injury or deceive - does not suffer from any vagueness. Such language of intent has a long history, with well-defined meanings, tracing those meanings back through centuries of common law and through dozens of state statutes.[13] Statutory intent language, which is not in and of itself vague, can serve to render a statute valid.

In yet another section of the decision below, the Court was troubled by the concept of applying the proscription against submitting "incomplete" claims, in "the absence of a duty to disclose the information." (App. 12-13). In effect, the lower Court is stating that unless a statute mandates that certain matters be disclosed, a prosecution for fraudulent nondisclosure or concealment cannot proceed. Thus, the only way

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[13] Numerous Florida Statutes have language referring to an intent to defraud, See, e.g., Florida Statutes, sections 112.3173(2)(e); 116.34(5); 220.803(1); 319.35(2)(c); 328.05(2); 370.036(4); 509.151(1); 513.121(1); 550.285(2); 562.32; 562.33; 562.36; 626.989(1); 631.262(1); 651.131(2); 655.0322(3)(a); 713.58(2); 812.155(1); 817.02-.62; 831.01 - .31; 832.014(1); 832.07(1)(a). Similarly, many Florida Statutes refer to an intent to deceive, See, e.g., 817.23; 817.236; 817.52; 790.164(1); 790.163; 686.501(7); 655.0322(3)(a). Still others have routinely referred to an intent to injure. See, e.g., 817.22; 817.23; 817.233; 817.236; 831.02; 831.09; 831.14; 831.21; 859.01; 861.03; 876.155(2).

for the legislature to cure the defects which the lower Court perceives, would be to enact a statute which specifically states that when an attorney submits a claim to an insurer, the attorney must, under all circumstances, regardless of the existence or nonexistence of an intent to defraud, disclose all medical reports, favorable or otherwise, and any other unfavorable data. The legislature consciously chose not to pursue such a draconian measure. Rather, the legislature, presuming that most claims would be based on good faith, with potential factual disputes, permitted attorneys, acting in good faith, to keep confidential adverse materials, as long as the attorneys were not engaged in an effort to defraud the insurer. The lower Court's decision would present an ultimatum to the legislature: either let attorneys refuse to disclose any adverse materials, even when they do so with an intent to defraud; or compel the attorneys to disclose absolutely everything. No halfway measures; no shades of gray; no distinctions based on good faith or intent or lack of intent to defraud. It's an all-or-nothing situation, and the lower court presumes that it is better able to make such a policy decision than the legislature,

Notwithstanding the lower Court's abdication of its judicial role and its intrusion into the proper domain of the legislature, the lower Court's conclusion finds no support in the pertinent case law. The federal mail fraud statute provides an analogous situation to the insurance fraud statute. The mail

fraud statute, 18 U.S.C. s. 1341, does not impose any particular duty to disclose any particular materials. It simply requires proof of a scheme to defraud and the use of the mail for the purpose of executing or attempting to execute the scheme. Notwithstanding the absence of any explicit mandate compelling disclosure of any particular items, the federal courts have routinely concluded that the statute can apply to various acts of concealment. Acts of concealment are held to constitute proscribed acts under the statute, "without proof of a duty to disclose the information pursuant to a specific statute or regulation. . . . Therefore fraud can be effected not only by deceitful statements but also by statements of half-truths or concealment of material facts." United States v. Keplinger, 776 F. 2d 678, 697-98 (7th Cir. 1985). See also, United States v. Biesiadecki, 933 F. 2d 539, 543 (7th Cir. 1991); United States v. Lindsey, 736 F. 2d 433 (7th Cir. 1984); United States v. Townley, 665 F. 2d 579, 585 (5th Cir. 1982); Lustiger v. United States, 386 F. 2d 132 (9th Cir. 1967). While many fraudulent omission cases involve fiduciary duties, fraudulent nondisclosures can be punishable where there was no fiduciary obligation to disclose. United States v. Allen, 554 F. 2d 398, 410 (10th Cir. 1977).

Likewise, the Seventh Circuit Court of Appeals rejected an attorney's argument that he had no legal duty to disclose to an insurer his payments under the table, for a

information, to the insurer's adjuster. United States v. Richman, 944 F. 2d 323,332 (7th Cir. 1991). "We have rejected the argument that there must be a clear legal rule prohibiting conduct or requiring disclosure of an action for it to provide a basis for a fraudulent scheme." Id,

The lower Court completely ignores the federal mail fraud cases, and comes to the conclusion that there must be an independent duty to disclose before fraud by concealment can be prosecuted. The lower Court predicates this conclusion solely on Chiarella v. United States, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed. 2d 348 (1980), a case in which the printer of corporate documents learned the names of companies which were targeted for corporate takeovers, and proceeded to buy shares in those companies without disclosing his knowledge. He sold his shares after the takeovers. A prosecution under Rule 10b-5 of the federal securities laws was deemed improper due to the absence of any duty to disclose. Rule 10b-5, which prohibited schemes to defraud, or business practices which operate as frauds, did not refer to acts of concealment. By contrast, Florida's insurance fraud statute specifically refers to the concealment of material facts, when it refers to incomplete submissions, and Florida's statute thus specifically criminalizes fraud by omission of material information when it is done with the intent to defraud insurers. Furthermore, regardless of any federal court construction of federal statutes, Chiarella is merely an

exercise in construction of a federal statute; it is not a decision based on federal constitutional principles. It has no binding effect with respect to a state court's construction of state statutes and does not mandate that the same conclusion apply to Florida's insurance fraud statute.

Thus, it should be noted that this Court has upheld provisions of Florida's welfare fraud statute which punishes the knowing failure to disclose a material fact used to determine eligibility for the food stamp program, as well as the knowing failure to disclose a change of circumstances in order to obtain financial assistance. Section 409.325(1)(a), Florida Statutes; Sanicola v. State, 384 So. 2d 152 (Fla. 1980); Riggins v. State, 369 So. 2d 948 (Fla. 1979) ("A man of common intelligence knows that the statute's proscription of fraudulently failing to disclose a 'material fact' encompasses any fact which would affect eligibility for the program."). Those decisions both involve forms of fraud by concealment or omission. Those statutory provisions were nevertheless valid, even though there were no references to independent duties to disclose any particular information.

Just as the concepts of intent to defraud and materiality are well understood and narrow the scope of the statute, so too, the statute's reference to "incomplete" statements submitted to insurers, is equally well understood.

The notion of "incompleteness" refers to "any fact or thing material to such claim, . . ." As previously noted, even the lower Court acknowedged that attorneys would readily identify "material" facts, (App. 12). There is thus no difficulty in understanding when a submitted claim is "incomplete."

One final consideration in determining whether section 817.234(1) clearly applies to attorneys who conceal material facts when submitting incomplete claims, etc., is the structure of section 817.234 itself. Of particular significance is section 817.234(3), which provides that "[a]ny attorney who knowingly and willfully assists, conspires with, or urges any claimant to fraudulently violate any of the provisions of this section . . . is guilty of a felony of the third degree." This statute serves to elevate conspiracies and solicitations from misdemeanors to third degree felonies, as those acts would otherwise be offenses which were one degree below the offenses designated as choate offenses in section 817.234(1). Not only are such actions elevated to the classification of third degree felonies, but the scope of subsection (3) relates to violations of "any provisions of this section." As such, the legislature is specifically tying actions of attorneys, in subsection (3), to any other provisions of section 817.234, including all acts designated in subsection (1), which includes "incomplete" submissions to insurers.

In conclusion, Florida's insurance fraud statute, through the use of commonly and well-understood terminology,[14] such as the intent to defraud and the materiality of the nondisclosed information, narrowly limits the scope and application of the statute, in the context of fraud by omission/incomplete claims. By virtue of such a statutory narrowing function, the statute applies to conduct which no attorney has any reason to believe is justified by virtue of ethical canons, confidentiality privileges, work product, or trial discovery rules. There is nothing vague about any of the terms of the statute. The lower Court has effectively abdicated its judicial **role** and intruded into the proper domain of the legislature, in determining what fraudulent acts are subject to criminal proscription. Furthermore, the lower Court's opinion, in concluding that the insurance fraud statute's proscription against fraud through incomplete claims is inapplicable to attorneys, effectively states that lawyers are a class unto themselves, apart from the penal proscriptions that apply to mere mortals. While the lower Court pays lip service to the notion that the legislature could draft a statute which would effectively apply to attorneys as well as the general public, as

[14] The test for determining whether a statute is unconstitutionally vague is whether if "'either forbids or requires the doing of an act in terms so vague that men of common inteligence must necessarily guess at its meaning and differ as to its application."' Bouters v. State, 20 Fla. L. Weekly S186, S187 (Fla. April 27, 1995), quoting Connally v. General Construction co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

previously detailed herein, pp. 42-43, supra, the lower Court's suggested remedy is clearly a draconian one, which would compel the legislature to completely alter current personal injury practice by requiring all claimants to disclose all material information, regardless of whether there is an intent to defraud. If the legislature is not willing to mandate such a draconian revision of the nature of personal injury practice, the lower Court is apparently willing to compel the public to tolerate the existence of attorneys who, with an intent to defraud insurers, withhold material information from the claims that they submit to insurers.

CONCLUSION

Based on the foregoing, the portion of the lower Court's decision which addresses the applicability of section 817.234(1) to attorneys who submit "incomplete" claims to insurers should be quashed and the certified question should be answered in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits was mailed this 10th day of July, 1995, to H. DOHN WILLIAMS, JR., Esq., The 210 Tower - Suite 1710, P.O. Box 1722, New River Station, Ft. Lauderdale, FL 33302; ARCHIBALD THOMAS, III, Esq., Suite 1640, Gulf Life Tower, 1301 Gulf Life Drive, Jacksonville, FL 32207; EDWARD SHOHAT, Esq., Courthouse Center - Suite 1730, 175 N.W. 1st Avenue, Miami, FL 33128; EDWARD R. CARHART, Esq., 2151 S. LeJeune Road, Suite 202, Coral Gables, FL 33134; RONALD GURALNIK, Esq., One Biscayne Tower, Suite 1928, Two south Biscayne Blvd., Miami, FL 33131; NEAL SONNET, Esq., One Biscayne Tower, Two South Biscayne Blvd., Suite 2600, Miami, FL 33131; MARE HICKS, Esq., Hicks, Anderson & Blum, P.A., New World Tower, Suite 2402, 100 North Biscayne Blvd., Miami, FL 33132; J. DAVID BOGENSCHUTZ, Esq., 600 S. Andrews Avenue, Suite 500, Fort Lauderdale, FL 33301; RONALD I. STRAUSS, Esq., 3370 Mary Street, Coconut Grove, FL 33133.

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