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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,239

H.B.A. MANAGEMENT, INC., etc.,

Petitioner,

vs.

The Estate of MAY SCHWARTZ, etc.,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE, DEPARTMENT OF LEGAL AFFAIRS,
IN SUPPORT OF POSITION OF RESPONDENT

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INTRODUCTION

This amicus curiae brief is filed on behalf of the State of Florida's Department of Legal Affairs, who will be referred to in this brief as the State. In this brief, the State will ask this Court to approve the decision of the Fourth District *sub judice* and disapprove the decision of the Second District in *Barfuss v. Diversicare Corp. Of America*, 656 So. 2d 486 (Fla. 2d DCA 1995).

In this brief, the parties will be referred to as they appear before this Honorable Court. Unless otherwise indicated, all emphasis has been supplied.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts have been adequately set forth by the parties in their respective briefs.

SUMMARY OF THE ARGUMENT

In accordance with the decision of the Fourth District *sub judice*, Florida Bar Ethics Opinion 88-14, ABA Formal Ethics Opinion 95-396, and the overwhelming majority of courts throughout the nation that have considered the issue, Rule 4-4.2 of the Rules of Professional Conduct should be construed so as to permit *ex parte* communications with unrepresented former employees of a corporate litigant. Indeed, prohibiting such communications would greatly impede, if not effectively negate, the State's ability to investigate and gather information necessary for the enforcement of various statutes enacted for the protection of the citizens of Florida. Consequently, this Court should approve the decision of the Fourth District *sub judice*, and disapprove of the Second District's conflicting decision in *Barfuss*.

ARGUMENT

RULE OF PROFESSIONAL CONDUCT 4-4.2 DOES NOT
PROHIBIT EX PARTE COMMUNICATIONS WITH AN
ADVERSE CORPORATE PARTY'S FORMER EMPLOYEE(S).

The issue before this Court is whether Rule of Professional Conduct 4-4.2 prohibits plaintiff's counsel or his/her investigator from making direct contact with former employees of a corporate defendant. Rule 4-4.2 provides in pertinent part that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person a lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer....

Thus, as argued by Respondent in its brief on the merits, it is clear that the Rule only prohibits *ex parte* communications "with a person the lawyer knows to be represented by another lawyer in the matter." Significantly, the Rule does not prohibit *ex parte* communications with unrepresented former employees of a corporate litigant.

The Second District in *Barfuss v. Diversicare Corp. Of America*, 656 So. 2d 486 (Fla. 2d DCA 1995), restrictively interpreted Rule 4-4.2 so as to preclude plaintiff's counsel from having any *ex parte* contact with such former employees. Interestingly, the Second District distinguished the holding of its

earlier decision in *Manor Care of Dunedin, Inc., v. Keiser*, 611 So. 2d 1305, 1308 (Fla. 2d DCA 1992), in which it had ruled that both the plaintiff and the defendant nursing home were entitled to conduct *ex parte* interviews of former employees of the defendant. In *Keiser*, the district court had held that the ethical restraints of Rule 4-4.2 against *ex parte* contact with unrepresented employees of a represented corporation did not apply once the employees had left the corporation.

As will be explained, the Second District's decision in *Barfuss* decision has far-reaching consequences that will adversely affect the State's ability to investigate and gather information necessary for the enforcement of various statutes. Since the *Barfuss* decision would necessarily emasculate the State's power to enforce statutes involving, *inter alia*, deceptive and unfair trade practices, §501.201, Fla. Stat., the protection of the rights of nursing home residents, §400.102, Fla. Stat., and Medicaid fraud, §409.910(18)(a) and §409.913, Fla. Stat., and considering the fact that the vast majority of courts that have considered the precise issue involved herein have held that Rule 4-4.2 does not preclude direct contact of a corporate defendant's former employees, the State submits that the district court's decision *sub judice* should

be approved and that the Second District's decision in *Barfuss* should be disapproved.

In support of its position, the State sets forth the following example. The Department of Legal Affairs, through the Office of the Attorney General, is empowered to investigate, *inter alia*, complaints of deceptive and unfair trade practices under §501.201, Fla. Stat. (the "Florida Deceptive and Unfair Trade Practices Act"). Many times these complaints involve the conduct and/or practices of corporations. In carrying out its responsibility to investigate deceptive and unfair trade practices allegedly committed by these corporations, the State, through its attorneys and investigators, oftentimes receives vital information from ex-employees of the corporation being investigated concerning the practices of that corporation. Without the ability to interview former employees of the corporation, the State would obviously be unable to obtain invaluable information necessary to prove or disprove statutory violations. Thus, the State submits that, in accordance with the decision of the Fourth District *sub judice*, Florida Bar Ethics Opinion 88-14, ABA Formal Ethics Opinion 95-396, and the overwhelming majority of courts throughout the nation that have considered the issue, Rule 4-4.2 should be construed so as to

permit *ex parte* communications with unrepresented former employees of a corporate litigant.

In sum, the net effect of the Second District's decision in *Barfuss* is to prevent the State from properly carrying out its statutory duty to investigate deceptive and unfair trade practices, to investigate Medicaid fraud, and to protect the rights of nursing home residents, *inter alia*. Indeed, prohibiting the State from interviewing the former employees of a corporation under investigation would effectively negate the State's power to enforce various laws enacted to protect the citizens of Florida. Consequently, this Court should approve the decision of the Fourth District *sub judice*, and disapprove of the Second District's decision in *Barfuss*.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, the State of Florida respectfully requests that this Honorable Court approve the decision of the Fourth District below, and disapprove the decision of the Second District in *Barfuss*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae, Department of Legal Affairs, in Support of Position of Respondent was furnished by U.S. Mail to Nancy W. Gregoire, Esq., Bunnell, Woulfe, Kirschbaum, Keller & McIntrye, P.A., 888 East Las Olas Blvd., 4th Floor, Ft. Lauderdale, Florida 33301; Jane Kreuzler-Walsh, Esq., Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Bch., Florida 33401; James B. McHugh, Esq., Wilkes & McHugh, Suite 601 Tampa Commons, One North Dale Mabry Highway, Tampa, Florida 33609; Phillip D. Parrish, Esq., Stephens, Lynn, et al., 9130 South Dadeland Blvd., Penthouses 1 and 2, Miami, Florida 33156; and Joel D. Eaton, Esq., Podhurst, Orseck, et al., 25 West Flagler Street, Suite 800, Miami, Florida 33130, on this 3rd day of October, 1996.



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