ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

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H.B.A. MANAGEMENT, INC.
authorized to operate
TAMARAC CONVALESCENT CENTER,

Petitioner,

vs.

Case No: 88,239

THE ESTATE OF MAY SCHWARTZ,
Deceased, by and through the
Personal Representative,
ALEX SCHWARTZ,

Resportdent.

AMICUS BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF THE PETITIONER

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STATEMENT OF THE CASE AND FACTS

As amicus, the FDLA will adopt the Statement of the Case and Facts contained in Petitioner H.B.A.'s Initial Brief on the merits.

INTRODUCTION

This amicus curiae brief is filed on behalf of The Florida Defense Lawyers Association. In this brief we ask this Court to affirm the decision in **BARFUSS v. DIVERSICARE, CORP. OF AMERICA,** 656 So.2d 486 (Fla. 2d DCA 1985), and quash the opinions in **REYNOSO v. GREYNOLDS PARK MANOR, INC., 659 So.2d 1156 (Fla. 3d DCA 1995)** and **ESTATE OF SCHWARTZ v. H.B.A. MANAGEMENT, INC., 673 So.2d 116 (Fla.4th DCA 1996).**

The ethics of our practice and sound public policy compel the conclusion that in cases such as these, a plaintiff's counsel should be precluded from ex parte contact with current or former employees of a defendant corporation which employees cared for and treated the plaintiff and are therefore "the very persons whose actions or inactions form the basis for the complaint." **BARFUSS, 656 So.2d at 489.**

SUMMARY OF THE ARGUMENT

The issue presented by this case is the protection afforded to an organizational defendant by Rule of Professional Conduct 4-4.2. Specifically, the issue before the Court is the extent of the protection which the Rule affords to an organizational defendant, such as H.B.A., to protect it against ex parte contact by opposing counsel with those employees whose very acts or omissions form the basis of the lawsuit.

In this instance, the lawsuit is an action brought pursuant to Chapter 400, Florida Statutes (1992), which sets forth the standards for the care of persons in nursing homes, as well as the maintenance and operation of such institutions.

In fact, each of the District Court opinions which have addressed the issue presented to this Court have done so in the context of a Chapter 400 lawsuit. See, e.g., **ESTATE OF SCHWARTZ v. H.B.A. MANAGEMENT,** 673 **So.2d 116 (Fla. 4th DCA 1996); REYNOSO v. GREYNOLDS PARK MANOR, INC., 659 So.2d 1156 (Fla. 3d DCA 1995); BARFUSS v. DIVERSACARE CORP. OF AMERICA,** 656 **So.2d 486 (Fla. 2d DCA 1995).** See also, **MANOR CARE OF DUNEDIN, INC. v. KEISER, 611 So.2d 1305 (Fla. 2d DCA 1992).**

The comment to Rule 4-2.2 extends the prohibition against ex parte contact with represented persons (here the organization, H.B.A. Management) to, among others:

> Any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability., ,

Comment to Rule 4-4.2.

The protection afforded to **an** organizational defendant by Rule 4-4.2 would surely ring hollow if the comment is interpreted, as it was in REYNOSO and SCHWARTZ, to apply only to employees who are still employed by the organizational defendant. It is undeniable that an ex-employee's actions which occurred during the course of his or her employment would be imputed to the employer in the same fashion as **a** current employee whose former acts or omissions can be imputed to the employer. The organizational defendant has the same concerns -- indeed, arguably increased concerns -- about ex parte contact by opposing counsel with ex employees as it does with current employees.

This Court should quash **REYNOSO** and **SCHWARTZ,** and adopt the rationale of the court in **BARFUSS** which properly interprets the Rule to protect an organizational defendant from ex parte contact by opposing counsel with current or former employees where those employees cared for and treated the plaintiff and are therefore "the very persons whose actions or inactions form the basis for the complaint." **BARFUSS,** 656 **So.2d at 489,**

ARGUMENT

RULE 4-4.2 DOES NOT PERMIT EX PARTE COMMUNICATIONS WITH AN ADVERSE CORPORATE PARTY'S FORMER EMPLOYEE WHOSE CONDUCT COULD BE IMPUTED TO ESTABLISH LIABILITY AGAINST THE CORPORATION.

This brief is designed to expose the fallacy of those courts (and other authorities) which have interpreted Rule 4-4.2, and its comment in such a way as to restrict its application solely to employees who are still employed by the corporation at the time of the attempted communication by opposing counsel. Nothing in the language of the Rule or its comment suggest that the Rule should be so restricted; to the contrary, **a** common sense interpretation of the comment which explains the application of the Rule to a situation where the "person" is an organization or corporation, compels the conclusion that the Rule should not be so narrowly interpreted.

The relevant portion of the comment provides:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter **may** be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(emphasis added).

The underlined phrase "any other person whose act or omission in connection with that matter may be imputed to the organization

for purposes of civil or criminal liability" is not even arguably restricted solely to employees who are still employed by the organization at the time of the proposed communication by opposing counsel.It defies logic to suggest that an organization would not have the same concern about ex parte contact with a former employee whose actions form the basis of a lawsuit as the organization would have for a current employee whose actions form the basis of a lawsuit; either person's actions can be used to impute liability to the organization.

Original Sin: WEIGHT v. GROUP HEALTH HOSP., 691 P.2d 564 (1984).

In **REYNOSO V. GREYNOLDS PARK MANOR, INC.,** 659 **So.2d 1156** (Fla. **3d DCA** 1995), the court relied extensively upon **AMERICAN BAR ASSOC., FORMAL ETHICS OPINION 91-359, dated March** 32, **1991,** and **FLORIDA BAR ETHICS OPINION 88-14, issued March 7, 1989. REYNOSO, 659 So.2d at 1157.** In fact, those opinions are included in the appendix to the REYNOSO decision. **659 So.2d at 1158-64.**

Both of those ethics opinions -- which are not binding on this or any other court -- specifically relied upon the 1984 decision in **WRIGHT v. GROUP HEALTH HOSP.,** for the proposition that:

> **Because** former employees cannot possibly speak for **a** defendant corporation, the rule against communicating with adverse parties does not apply.

FLORIDA BAR COMMITTEE ON PROFESSIONAL ETHICS, Opinion No. 88-14 (as quoted in **REYNOSO,** 659 **So.2d** at 1164) . In fact, FLORIDA BAR **COMMITTEE ON PROFESSIONAL ETHICS, Opinion No. 88-14 goes** on to note

that the WRIGHT court "found no reason to distinguish between former employees who witness an event and those whose act or omission caused the event." This distinction was premised upon the fact that the purpose of Rule 4-4.2 is "not to protect a corporate party from revelation of prejudicial facts, but rather to preclude interviewing of employees who have authority to bind the corporation." Id. The ABA Opinion 91-359 likewise relied extensively upon WRIGHT. See, REYNOSO, 659 So.2d at 1159.

The problem with the WRIGHT analysis is that it is wrong. The comment to Rule 4-4.2, in discussing the situation where an organization or corporation is a party to the lawsuit, states that the Rule "prohibits communications by a lawyer for one party concerning the matter in representation with....any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability., . ." This language does not draw a distinction between current and former employees nor can it reasonably be interpreted to suggest such a distinction. To the contrary, if the Rule was not intended to apply to the present situation, then the drafters of the comment would have limited the applicability to "any employee" or "any current employee."

On July 28, 1995, the ABA issued Opinion 95-396, which specifically rejected the "control group" test as overly restrictive and erroneously scrutinizing "anyone 'whose act or omission in connection with that matter may be imputed to the organization for purposes of criminal liability...."' Id at Page

7. (emphasis added).

Nevertheless, in a footnote, this new ABA Opinion clings to the earlier conclusion that R. P. C. 4.2 does not prohibit contacts with former employees. Id. **at 20 n.47.** There is no further analysis on the issue; simply a reiteration of the prior conclusion.

However, in a concurrence to ABA Opinion 95-396, and a dissent to the Opinion, some members of the committee took issue with the conclusions of the majority. (See discussion of this issue in Petitioner's Brief at Page 2-24).

In this age of transiency, where the concept of employer-employee loyalty has seriously eroded (from both ends) , it is naive to suggest that the Rule should be interpreted as it has been interpreted in **REYNOSO** and **SCHWARTZ.** An individual whose actions or inactions during the course of his employment were negligent, and could therefore "be imp-uted to the organization for purposes of civil liability" does not cease to be such a liability-imputing person simply because he or she goes to work for another entity.

In this regard, both the ABA and The Florida Bar rely on nothing more **than** ipse dixitism as the fundamental underpinning for their opinions. For instance, the ABA opinion notes that:

> The comment to Rule 4.2 makes clear that corporate parties are included within the meaning of 'party' in that Rule, and is helpful in defining the contours of that rule as it applies to present employees of corporate parties.

ABA, Opinion, as quoted in **REYNOSO, 659 So.2d at 1159. By so**

stating the point, the ABA has begged the question. The phrase "present employees" does not appear in either the Rule or its comments. The ABA has simply engrafted that phrase into the comment. Having done so, it is no surprise at all that the opinion concludes that ex-employees are not covered by the Rule. If the ABA's analysis had no% been skewed as it was in the beginning, it is doubtful that the same conclusion would have been reached.' For instance, the ABA opinion noted that "the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law." **ABA Opinion, 659 So.2d at 1159.** Nothing about that concern is altered by the fact that a person whose act or omission can be imputed to the organization is no longer employed by the organization.

The **ABA Opinion,** went on to note that whether an employee falls into one of the three categories set forth in the comment to the Rule depends in part upon the "relevant statutory and common law of the state of the corporation's incorporation" and "applicable rules of evidence in the relevant jurisdiction." **Id. 659 So.2d at 1160.** The statutory and common law of Florida and **any** applicable rules of evidence do not change the liability-imputing nature of an employee's actions simply because the employee has left the employment of the particular defendant.

'Thus, bringing to mind the observation made by Judge Pearson in his dissenting opinion in **CORALUZZO v. FASS, 435 So.2d 262, 265 (Fla. 3d DCA 1983)** that "in law,... the right answer usually depends on putting the right question." (quoting **ROGERS v. HELVERING, 320 U.S. 410, 413, 64 S.Ct. 172, 174, 88 L.Ed. 134, 137 (1943).**

The **ABA Opinion** also states that "neither the Rule nor its comment purports to deal with former employees of a corporate party." We can just as easily add that nothing in the Rule or its comment purports to deal solely, with "current" employees of a corporate party.

In the very next breath the **ABA Opinion** notes that the comment is addressed to "persons" instead of "employees" and ruminates as to whether the Rule would apply to independent contractors as well as employees. However, because of its antecedent conclusion that ex-employees are not covered by the Rule or its comment, the ABA fails to analyze whether use of the word "person" instead of either "employee" or "current employee" signals a more expansive interpretation to include ex-employees.

The words utilized in the Rule must be given their plain English meaning. See, **NICOLL v. BAKER, 668 So.2d 989, 990-91 (Fla. 1996).** The plain meaning of the phrase "any persons" cannot be interpreted to include solely current employees to the exclusion of former employees, particularly where the former employees' prior actions can still be utilized to "impute liability" to the corporate defendant. See also, **LANG v. SUPERIOR COURT, 826 P.2d 1228, 1232 (Ariz. Ct. App. 1992)** ("person" suggests broader interpretation than "employee"). That the term "persons" should not be narrowly construed is confirmed by antecedent "any". The only sensible way to interpret that phrase in the context of the Rule is to apply it to current and former employees whose acts form the basis of the very lawsuit in question.

This construction avoids the quandary which would be presented if an employee ceased to be an employee just prior to trial. would that ex-employee now be fair game for ex parte contact? The only workable solution which is consistent with the purpose of the Rule, i.e., to protect the organizational defendant, is to interpret "any person" in this context to mean both current and former employees, so long as those particular employees' actions or inactions form the basis for the dispute in question. That is precisely what the court did in **BARFUSS**.

In the final analysis, the **ABA Opinion** rests upon a particular committee's interpretation of public policy. While recognizing persuasive policy arguments in favor of the position which we currently espouse, the committee concluded that:

> The fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage [ex-employees] was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the committee is loath, given the text of Model Rule 4.2 and its comment, to expand its coverage to former employees by means of liberal interpretation.

ABA Opinion, as quoted in **REYNOSO, 659 So.2d at 1161.**

The truth of the matter is that the text of the Rule does not limit its application to current employees, nor does it preclude its application to ex-employees. It simply does not state definitively whether it applies to ex-employees or current employees. Indeed, the use of the phrase "any other person" in the

comment suggests that ex-employees are included. Second, the ABA's concern that our interpretation of the Rule would "inhibit the acquisition of information about one's case," is of little consequence. The Rule as we interpret it, and as the **BARFUSS** court has interpreted it, does not inhibit the acquisition of information about the Plaintiff's case any more than this Court's opinion in ACOSTA v. RICHTER inhibits the acquisition of information with respect to a defendant's case. In each instance the party seeking the information has the absolute right to set for deposition the person with whom he is precluded from contacting ex parte. If the increased cost of litigation necessitated by a prohibition against ex parte contact with witnesses was not a basis for allowing ex parte contact in RICHTER, then it should not be a basis in the present case.

WRIGHT v, GROUP HEALTH HOSP., supra, and many of the other cases which have followed suit, see, e.g., **REYNOSO, 659 So.2d at** 1157-58 n.1, focused primarily on the third category of persons addressed by the comment, i.e., those whose statements may constitute an admission on the part of the organization. In particular, FLORIDA **BAR COMMITTEE, Opinion** No. 88-14 noted that a former manager or employee is no longer in the position to speak for the corporation, relying upon **§90.903(18)(e), Florida Evidence Code,** which provides that a statement by an agent or a servant of a party is admissible against the party only if it was made during the existence of the agency or employment relationship. **REYNOSO, 659 So.2d at 1163.**

But that rule of evidence and that rationale can only apply to the third category of persons identified in the comment, i.e., a person whose statement may constitute an admission on the part of the organization.

In contrast, a person whose act or omission in connection with the matter in representation may be imputed to the organization for purposes of civil liability, i.e., the z-employees in this case, do fall with in the ambit of Rule 4-4.2.

The publication of the ABA opinion 91-359 on March 22, 1991 was a watershed event in the ongoing analysis of Rule 4-4.2. See, e.g., **AIKEN v. BUSINESS AND INDUSTRY HEALTH GROUP, INC., 885 F.Supp. 1474, 1477-78 (D.Kan. 1995)** (cataloguing cases that have adopted the ABA opinion, and noting that most **cases** which have interpreted the Rule to apply to ex-employees predate the ABA opinion).

The fact that many of the **cases** which have interpreted the Rule to apply to ex-employees were decided prior to the issuance of the ABA opinion does not detract from our argument; it supports our argument. Prior to the ABA opinion, courts analyzed the Rule and the comment free from the ex-post facto opinion of the ABA which, unlike the analysis employed by the prior courts, was susceptible to political malleability. It goes without saying that if the analysis cf the ABA and The Florida Bar Association was flawed with respect to the applicability of the Rule to our present situation, then so are those **cases** which rely upon the opinions, including **REYNOSO and SCHWARTZ.**

In **AIKEN,** the court deemed the comment to Rule 4.2 to be inconsistent with the Rule itself "to the extent that it expands, or tends to expand, the plain meaning of the term 'party' to include persons with no current employment relationship with the organizational party." 885 **F.Supp at 1478.** Once again, this analysis improperly focuses upon the employment status at the time of the proposed communication with opposing counsel, instead of properly focusing upon the employment status of the individual at the time of the act or omission which is alleged to be negligent.

The **AIKEN** court went on to analyze the purposes of Rule 4-2.2 in an improper context. Quoting extensively from **HANNTZ v. SHILEY,** 766 **F. Supp. 258 (D. N.J. 1991),** the court noted that the purpose of the Rule was to prevent the representative party "from being overwhelmed by opposing counsel in the absence of friendly counsel, and by preventing conduct intended to induce the representative party to somehow impair, compromise or settle his or her own case." **885 F.Supp at 1479. Thus,** the court continued, if the communication is with an ex--employee, these concerns do not come into play. **Id.** Nothing could be further from the truth. An ex-employee is just as susceptible to being overwhelmed as is a current employee.

The "party" or "person" which Rule 4.2 is ultimately designed to protect is not the ex-employee; rather, it is the corporation or organization itself. To be sure, the Rule protects the corporation by limiting **access** to "any" person whose act or omission may be imputed to the organization. But the fact that the subject of the

ex parte contact is no longer employed by the organization does not lessen the need to protect the organization from that contact. On the contrary, the need is heightened when dealing with ex-employees.

The comment to the Rule simply makes a common sense observation that where the party is a corporation, its employees, including in particular those whose actions or inactions can be utilized to impute negligence to the party, should come within the protection of the Rule. The Rule does not bring ex-employees within its purview for the protection of the ex-employee; rather, it brings ex-employees within its purview for the protection of the organization. Viewed thusly, there can be no doubt about the fact that the Rule prohibits plaintiff's counsel in a case such as this from contacting ex-employees whose actions or inactions at the time that they were employed can still be imputed to their former employer.

The Amended Complaint.

In order to better determine whether the purposes of Rule 4-2.2 would be served by application of the Rule to former employees of an organization whose acts or omissions form the very basis of the complaint against that organization, it is appropriate that we look to the allegations of negligence and violations of the nursing home statute set forth in the complaint. The amended complaint alleged that the defendant was negligent in the following respects:

(a) Failing to properly provide a program for the prevention of pressure sores and the treatment of

such sores after they have occurred;

(b) Failing to provide a proper mattress and bedding for MAY SCHWARTZ, protective devices and positioning devices;

(c) Failing to turn and position MAY SCHWARTZ timely and appropriately to prevent pressure sores in such a manner as to prevent harm to MAY SCHWARTZ during such positioning;

(d) Failing to properly assess MAY SCHWARTZ' risk for the development of pressure sores;

(e) Failing to properly recognize MAY SCHWARTZ' development of pressure sores and obtain treatment to prevent the worsening of such pressure sores;

(f) Failing to develop, implement, and update an adequate and appropriate resident care plan to meet MAY SCHWARTZ' needs;

(g) Failing to maintain medical records which contain sufficient information to justify the diagnosis and treatment and to document the results, including at a minimum documented evidence of assessments of the needs of residents, of establishment of appropriate plans of care and treatment, and of the care and services provided;

(h) Failing to properly notify the family of MAY SCHWARTZ of significant changes in MAY SCHWARTZ' health status;

(i) Failing to provide adequate and appropriate health care for MAY SCHWARTZ;

(j) Failing to provide MAY SCHWARTZ with sufficient fluids to prevent dehydration;

(k) Failing to provide MAY SCHWARTZ with sufficient nourishment to prevent malnutrition;

(l) Failing to provide sufficient therapeutic and rehabilitative services to maintain MAY SCHWARTZ' mobility and range of motion and to prevent contracture;

(m) Failing to properly supervise staff;

(n) Failing to properly train staff; and

(o) Improper retention of staff.

These 15 separate allegations involve specific negligent acts of individuals, some of whom may be ex-employees; they also allege a number of institution-wide acts of negligence which call into play managerial and supervisory level employees.

Many of these former employees **may** be difficult to locate. Indeed, they may be completely unaware that any of their prior actions are the subject of this lawsuit. Thus, prior to any contact by Plaintiff's counsel, they could not possibly be in a position to know that H.B.A. is willing to represent them. Furthermore, most of them are considerably less sophisticated and thus considerably more susceptible to "clever lawyers" than are the treating physicians who are the subject of 9455.241.

Ironically, pursuant to **REYNOSO** and **SCHWARTZ,** and in light of this Court's recent decision in **ACOSTA v. RICHTER, 671 So.2d 149 (Fla. 1996)**, counsel for a hospital sued for malpractice could not contact a physician who treated the patient (who is not a defendant to the malpractice action), but plaintiff's counsel could freely contact any and all former hospital employees, such as nurses, even those whose actions or inactions form the very basis for the alleged liability of the hospital.[2]

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[2]These authors represented the defendant in **RICHTER,** as well as the defendant in **PIERRE v. NORTH SHORE MED. CTR., INC., 671 So.2d 157 (Fla. 1996)**, and **CASTILLO-PLAZA v. GREEN, 655 So.2d 197 (Fla. 3d DCA 1995)**, which **was** quashed by this Court in **RICHTER.** During the course of that represehtation we argued that fact witnesses were "fair game". However, the plaintiffs in those actions as well as the Florida Trial Lawyers Association argued strenuously to the contrary, and this Court's opinion in **RICHTER** confirmed that there are exceptions to the notion that fact

It would indeed by ironic, and unfair, to allow plaintiff's counsel unfettered ex parte access to individuals whose testimony can be utilized by a jury to assess civil liability against a particular defendant, while at the same time preclude defense counsel from any[3] ex parte contact with a plaintiff's prior or subsequent treating physicians, whose testimony is not nearly as crucial to the outcome of the Plaintiff's cause of action.

That these issues are **related** in more than an ironic sense is confirmed by the fact that the **REYNOSO** court analogized its holding to its prior opinion in **CASTILLO-PLAZA v. GREEN, 655 So.2d 197 (Fla. 3d DCA 1995)** (en banc), which interpreted §455.241 to allow ex parte contact by defense counsel. See, REYNOSO, 659 **So.2d at 1158 n.1. Of course,** 5 months after the REYNOSO decision was filed, this Court quashed **CASTILLO-PLAZA, See, ACOSTA v. RICHTER, supra.**

One of the arguments made by the defense Bar in support of allowing ex parte contact with treating physicians was the expense of having to conduct formal discovery via deposition. That argument failed in **ACOSTA v. RICHTER. Similarly, many courts,** including REYNOSO, have suggested that the expense to a plaintiff

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witnesses are fair game. To be sure, this Court interpreted a statute in **ACOSTA v. RICHTER.** But the legislature does not have a monopoly on the recognition and enforcement of public policy. Both sound public policy and the language of Rule 4-2.2 and its comment suggest that this Court should affirm **BARFUSS** and quash REYNOSO and **B.B.A. v. SCHWARTZ.**

[3]In fact, one court has interpreted Section 455.241(2) so as to preclude defense counsel from even contacting **a** treating physician's office for the purposes of setting a deposition; rather, the depositions must be coordinated through the office of plaintiff's counsel! See, KIRKLAND **v.** MIDDLETON, 639 **So.2d 1002, 1003 (Fla. 5th DCA), rev. dism'd., 645 So.2d 453 (Fla.** 1994).

in developing its case is a factor to be considered in interpreting Rule 4-2.2. **REYNOSO,** 659 **So.2d at** 1157 (noting that in light of the order entered by the trial court plaintiff may only obtain discovery from former nursing home employees by scheduling 60 depositions) . See also, **HANNTZ v. SHILEY,** 766 **F.Supp at 270** (noting that any restriction would unduly restrict access to all relevant information) .

Although the **HANNTZ** court did not specifically mention the expense of taking discovery, that concern can be inferred because a ban on ex parte contact would not in any way restrict the plaintiff's counsel from setting the deposition of a former employee. Alternatively, an informal interview could be arranged where both the plaintiff's counsel and the organization's counsel are present. Thus, the only legitimate concern about restriction of **access** to former employees is monetary.

We agree with the Petitioner that this concern "pales in comparison tc the prejudice done to the corporate defendant whose ex-emplcyee is exposed to Testimonial sculpting at the hands of an adversary's clever lawyer." We also note that this is precisely the argument raised by the plaintiffs' Bar both before this Court, and before the Florida Legislature, in support of Section §455.241(2).

Indeed, prior to the enactment of §455.241(2), when analyzing the issue of ex parte contact with treating physicians on a clean **slate,** this Court had previously found no prohibition whatsoever against such contact. See, **CORALLUZZO v. FASS, 450 So.2d 858 (Fla.**

1984). Because the potential impact of ex parte contact with an ex-employee upon an organizational defendant's case is so much more detrimental than ex parte contact with a treating physician is upon a plaintiff's medical malpractice action, and because the only logical interpretation of Rule 4-2.2 and its comment requires the disallowance of ex parte contact with current or former employees whose acts form the basis of the matter in controversy, it would be inconsistent for this Court to do anything other than to affirm BARFUSS and quash REYNOSO and SCHWARTZ.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision in BARFUSS v. DIVERSICARE CORP. OF AMERICA, 656 SO.2D 486 (fLA. 2D dca 1985) and quash the opinions in REYNOSO v. GREYNOLDS PARK MANOR, INC., 659 So.2d 1156 (Fla. 3d DCA 1995) and ESTATE OF SCHWARTZ v. H.B.A. MANAGEMENT, INC., 673 So.2d 116 (Fla. 4th DCA 1996).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 8th day of August, 1996, to: Douglas J. Glaid, Esq., Department of Legal Affairs, 110 **Tower,** 10th FL, 110 S.E. 6th Street, Ft. Lauderdale, FL 33301; Nancy W. Gregoire, Esq., Bunnell, Woulfe, et al., 888 East Las Olas Blvd., 4th FL., Ft. Lauderdale, FL 33301; Jane Kreusler-Walsh, Esq., S/503, Flagler Center, 501 So. Flagler Drive, West Palm Beach, FL 33401; James B. McHugh, Esq., Wilkes & McHugh, S/601 Tampa Commons, One North Dale Mabry Highway, Tampa, FL 33609; Joel D. Eaton, Esq., Podhurst, Orsek, et al., 25 West Flagler Street, S/800, Miami, FL 33130.

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