ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 88,239

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

Petitioner,

v.

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

Respondent.

REPLY BRIEF ON THE MERITS

On Discretionary Review of an Opinion of the District Court of Appeal of the State of Florida, Fourth District

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PREFACE

Petitioner H.B.A. Management, Inc., will be referred to as "HBA."

Respondent 'The Estate of MAE SCHWARTZ will be referred to as the "Estate."

Respondent's Amicus Curiae, Academy of Florida Trial Lawyers, will be referred to as "Florida Trial Lawyers."

Respondent's Amicus Curiae, Florida Department of Law Enforcement, will be referred to as "FDLE."

The Initial Brief will be cited as "IB___."

The Answer Brief will bc cited as "AB___."

The Amicus Curiae Brief of Academy of Florida Trial Lawyers will be cited as "FTL ___."

The Amicus Curiae Brief of Florida Department of Law Enforcement will bc cited as "FDLE ."____."

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ARGUMENT

1. 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.

A. Overview

The Estate and its two amici make essentially six arguments against extending the protection of Rule 4-4.2 to cx-employees whosc conduct may impute liability to the corporate ex-employer. The first argument is that the overwhelming weight of authority favors their position, and that *Barfuss v. Diversicare Corporation of America*, *656 So.* 2d **486** (Fla. 2d DCA 1995), is simply wrong. (AB 2, 3, 15- 18; FTL 1-2, 4-11, 13-18; FDLE 5, 6). The second argument is that there is no longer any "relationship" between an ex-employee and the former corporate employer, so the ex-employee is "'unrepresented" and therefore outside the Rulc. (AR 4-5, 8-9; FTL 2, 4-6, 19). The third argument is that HBA's reading of the Comment, like that of the *Barfuss* court, expands the Rule beyond its plain intention. (FTL 2, 5-6, 19-20). Florida Trial Lawyers add additional arguments: (1) that HBA's cynicism is inappropriate and should not influence the Court's interpretation of the Rule; and (2) that the rationale behind section 455.24 I (2), Florida Statutes, does not apply here. (FTL **2-3, 19-23).** And, finally, both the Estate and Florida 'Trial Lawyers join the Florida Department of Law Enforcement in contending that HBA's interpretation of the Rule will destroy their ability to investigate before filing suit. (AB 18; FTL 11-13; FDLE 6).

Not one of those arguments correctly analyzes *Barfuss*, puts the Rule or its Comment in the proper perspective, or gives any consideration to the points in HBA's Initial Brief.

B. The Alignment of Authority

Both the Estate and Florida Trial Lawyers argue that the district court's conclusion in this case has overwhelming national support, and that *Barfuss* is wrong. (AB 3, 15-18; FTL 1, 4, 9-11). HBA acknowledged the weight of authority in its lnitial Brief, but explained that the cases cited by the Estate and Florida Trial Lawyers adopted tests inconsistent with the language of Rule 4-4.2, focused on facets of the Comment not applicable here, or simply erred. (IB 10, 11-26). HBA analyzed and categorized each case and explained why it should not control in Florida. The solution to this issue cannot be dictated by numbers alone. Contrary to the argument of the Estate and its amici, the *Barfuss* court recognized the real issue, correctly analyzed the problem, and reached the right conclusion. The court did not impose a blanket restriction on ex parte contact, but protected those ex-employees who were potentially individually liable for the plaintiffs alleged harm. *Barfuss*, and not *Estate of Schwartz v. H.B.A. Management, Inc.,* 673 So. 2d 116 (Fla. 4th DCA 1996), should be approved by this Court.

Furthermore, *Barfuss* relied on *Rentclub, Inc. v. Transamerica Rental Finance Corporation,* 8 11 F. Supp. 65 1 (M.D. Fla. 1992), *aff'd, 43* F.3d 1439 (11 th Cir. 1995), only to explain that the "second category" of the Comment to RPC 4.2 is "broad enough to include former employees whose actions or inactions could result in vicarious liability for the employer." *Barfuss*, 656 So. 2d at 488 n.4. Although *Rentclub* relied on *Public Service Electric and Gas Company v. Associated Electric and Gas Insurance Services, Ltd. ("'AEGIS'?, 745* F. Supp. 1037 (D.N.J. 1990), and HBA does not suggest that *PSEG*'s position is correct, the current position of the New Jersey Supreme Court still supports HBA's construction of Rule 4-4.2, and the conclusion reached by *the Barfuss* court. (AB 14; FTL 16-17). While rejecting the blanket rule of *PSEG*, the New Jersey Supreme Court

nevertheless noted that it has an "intuitive sense that when the organization's liability would be based on an individual's conduct, ex narte contact with the individual should afford some measure of protection to the alter ego that will suffer the punishment." *Matter of Opinion 668 of the Advisory Committee on Professional Ethics, 633* A.2d 959, 963 (N.J. 1984) (emphasis added). It concluded: "We believe, for the present, that in the post-indictment, post-filing stages of litigation, adversary counsel should not have the unqualified right to interview such an employee." *Id.* The court drew no distinction between employees and ex-employees. *Id.* at 964. Moreover, the New Jersey Supreme Court did not stop short at requiring notice; the opinion clarifies that the corporate counsel has a right to attend the interview, thus solving the ex-parte problem completely. *Id.* at 963-64.

The Estate and Florida Trial Lawyers also cite several ethics opinions deciding the issue against HBA. (AB 2, 5-7; FTL 7-9). Again, HBA explained that none controls here because each one reached its conclusion with little or no substantive analysis of the precise question before the Court. For instance, ABA Opinion 9 1-359 concluded, based on case law that contains no analysis of the third prong of the Comment to RPC 4.2, that '"persons" cannot include ex-employees because the "text of the Rule" does not specify former employees and the Comment "gives no basis for concluding that such coverage was intended." ABA Formal Op. 91-359 (emphasis added). The Opinion ignored the fact, however, that RPC 4.2 also does not specify current employees and provides no basis for any restriction on the term "persons" except the one given in the Comment. (FTL 8). The Opinion created its own version of the Comment even while acknowledging that the potential for imputed liability "may survive the termination of the employment relationship." ABA Formal Op. 91-359. Similarly, neither the Estate nor Florida Trial Lawyers explains why Florida Opinion 88-14 should control since it, also, discussed only the other two prongs of

the Comment to Rule 4-4.2, and never mentioned a corporation's potential liability for acts imputed to it by an employee, either current or former. (FTL 7-8).

No court, and no ethics opinion, has completely analyzed the problem from the perspective of the prong of the Comment at issue here. The question is not "managerial responsibility," or "admissions" binding the corporation. The question is whether an ex-employee is a '"person" protected by the Rule if his "act or omission . . . may be imputed to the organization. . . ." Florida Trial Lawyers even admits that the Comment "draws no explicit distinction between current and former employees." (FTL 6). The plain language of the Comment, without relying on expansion or advocacy by HBA, dictates that the answer is in the affirmative.

C. The "No Relationship--No Representation" Fallacy

The second common argument advanced by the Estate and Florida Trial Lawyers is a four-step theorem: (1) there is no longer any "relationship" between an ex-employee and the former corporate employer; (2) therefore, there is no relationship between the ex-employee and the former corporate employer's lawyer; (3) therefore, the former employee is not a "party represented by counsel"; (4) therefore, the former employee is outside the Rule. (AB 4-5; FTL 5-6, 18-19)

While the analysis has surface appeal, it begins with an inaccurate hypothesis and travels in a circle. Whether or not there is a "relationship" between the ex-employee and the corporate employer sufficient to trigger "representation" is the entire issue in this case. One cannot begin with the presumption there is no "relationship," as the Estate and Florida Trial Lawyers do (AH 5, 8; FTL 4-6, 1 1), then create an argument around the presumption. As Florida Trial Lawyers apparently recognizes, the "relationship" issue cannot be resolved by analysis of the Rule. (FTL 5). Strict reading of the Rule would eliminate the Comment

altogether, and would render the Rule meaningless in cases such as this. The sole purpose of the Comment is to create a framework for the Rule in cases where the represented party is a "legal fiction." (FTL 5). Therefore, in response to Florida Trial Lawyers' argument that HBA wants to use the Comment to "expand" the rule (FTL 6), HBA suggests that the expansion is inherent in the Comment and not anything planted there by HBA.

Once it is clear that analysis, not expansion, ofthc Comment is critical to the solution, the issue in cases such as this becomes what "relationship" with the corporate employer is sufficient to put the "person" in question within the protection of the Rule, That analysis cannot begin with the conclusion that there is no "relationship" between an ex-employee and the former corporate employer, and that former employees are therefore unrepresented, as the Estate and Florida Trial Lawyers urge. (AB 8; FTL 6). The language of the Comment is plain: a person is a "party," and therefore "represented," if his actions may impute liability to a corporate party." The "relationship" between the person and the corporation is inherent in the fact that the person has the ability to impute liability to the corporation. As Florida Trial Lawyers acknowledges, nothing in the Rule or the Comment dictates that the "relationship" must be a current employer-employee relationship. (FTL 6).

The same analysis defeats the Estate's argument that former employees are not within the scope of the Rule because they do not "qualify as agents of the corporation. . . ." (AB 8). If an ex-employee's acts during the time of employment may be imputed to the employer, that imputation must rest on principles of respondent superior, principal-agent, or vicarious liability. *See, e.g., Weinstock* v. *Groth*, 629 So. 2d 835, 838 (Fla. 1993) (employee of health care provider may impute liability to employer); *Carroll Air Systems, Inc. v. Greenbaum*, 629 So. 2d 9 14, 916- 17 (Fla. 4th DCA 1993) (employer liable for employee's negligent torts). To suggest that the liability imputed to the corporation from the ex-employee's acts (which

must rest on agency principles) survives the employment, but that no vestige of the agency itself survives to support an attorney-client relationship, creates an equitable asymmetry that is overwhelmingly pro-plaintiff.

The Estate also argues that ex-employees are not within the Rule because they have "neither sought nor consented to representation by the corporation's lawyer." (AB 5). The same rationale, however, may be applied to current employees, yet nothing in the Rule requires that a current employee consent to representation before receiving the Rule's protection. While the Estate and its amici apparently accept that the Rule and its Comment automatically protect, with or without prior consent, a current employee whose liability may be imputed to the employer, they find some distinction when the exact situation involves a former employee. For the Estate and Florida Trial Lawyers, the deciding factor is thus not the will of the employee, or the potential for imputed corporate liability. Instead, the Estate and its amici argue for a bright-line test that separates representation from non-representation solely on the basis of employment status while ignoring the "imputation" test dictated by the Comment. HBA suggests that the test recommended by the Estate and its amici creates an artificial distinction with no logical difference. The representation in both cases should bc presumed until the represented "person" dictates otherwise. Alternatively, if "consent" is the key, then the first contact with the ex-employee should be through formal discovery to determine if the ex-employee wishes the protection of the ex-employer's counsel, not through informal ex-parte investigation by the same attorney who wants to confirm the ex-employee's (and therefore the corporation's) liability.

The same lack of logic pervades the "attorney-client relationship" argument. (AB 5; FTL 2-3). One cannot begin with the conclusion that there is "no current attorney-client relationship" because that is the question in this case. One must begin with the question of

whether the relationship between the employer and the ex-employee is such that an attorney-client relationship should exist between the ex-employee and the corporate attorney. If the answer is "yes," then the ex-employee is a "person represented by counsel," and the Rule's prohibition is triggered. According to the Rule and the Comment, the types of "relationships" necessary to trigger the Rule include ones of imputed liability. The power to impute liability is a "relationship," although it may not be an "employment relationship." On the other hand, neither the Rule nor the Comment requires an "employment relationship," and imposing that restriction is precisely the expansion that Florida Trial Lawyers decries. (FTL 6, 19). In the absence of any restrictive language in the Rule or the Comment, any engrafting of a necessity for current employment should be rejected.

D. The "Expansion" Fallacy

This argument begins with the conclusion, adopted by the Estate and Florida Trial Lawyers, that "any other person" is automatically restricted to "current employee" and any other construction adds language to the Comment and, thus, to the Rule. (AB 4-5; FTL 19-20). There is nothing in the Rule, the Comment, or good English construction, to support the argument or the conclusion.

First, the Rule itself is clearly not limited to current employees since the Comment encompasses corporate agents as well. Comment, Rule 4-4.2; Comment, ABA Formal Op. 91-359. Second, because the other two prongs of the Rule encompass managing agents and those whose admissions may bind the corporation, then the third test must contemplate something else. The Estate and Florida Trial Lawyers give no explanation of what that "something else" might be. HBA agrees that an ex-employee cannot be a managing agent, and that an ex-employee's admissions cannot bind the corporation, but disagrees that an ex-employee's '"acts and omissions," which occurred during the employment, are not sufficient

"relationship" to trigger the Rule's protection for the ex-employee and the ex-employer. If the ex-employee, because of sophisticated lawyering, acknowledges acts giving rise to personal liability, whether or not the "admission" is technically binding on the corporation, the corporation will almost assuredly be found vicariously liable. Although the corporation may have a right of indemnification, the interests of the ex-employee and the ex-employer are identical until liability is established, and both should be entitled to the same protection.

If, as the Estate and Florida Trial Lawyers suggest, the ex-employee (or the current employee, for that matter) declines representation by the corporate attorney, then the Rule no longer applies. Until that time, however, the better-reasoned conclusion is to assume the application of the Rule, assume the representation, and assume the protection of the attorney-client privilege. That conclusion gives effect to the "broad coverage" the Rule was intended to provide. ABA Formal Op. 95-396.

E. The Difference Between Cynicism and Realism

Florida Trial Lawyers accuses IIBA of unbecoming cynicism. (FTL 2-3, 19-20). If that is true, and HBA suggests it is not, then HBA is in excellent company. *See, e.g.*, Comment, ABA Formal Op. 95-396 ("overreaching by adverse counsel"); Comment, ABA Formal Op. 9 1-3 59 ("superior skills of trained advocate"); *Wright by Wright v. Group Health Hospital*, 691 P.2d 564, 576 (Wash. 1984) ("shielding adverse party from improper approaches"); *PSE* & G, 745 F. Supp. at 1039 ("professionally trained lawyer may, in many cases, be able to win, or in the extreme case, coerce, damaging concessions from the unshielded layman"); *Monsanto Company v. Aetna Casualty & Surety Company, 593* A.2d 1013, 1020 (Del. Super. Ct. 1990) ("I am satisfied that there exists *prima facie* evidence to support the conclusion that some former employees were affirmatively misled" during ex-parte contact with investigators for adverse counsel.); *Papanicolaou v. Chase Manhattan*

Bunk. N.A., 720 F. Supp. 1080, 1084 (S.D.N.Y. 1989) (rule ""prevents unprincipled attorneys from exploiting the disparity in legal skills between attorney and lay people").

In accusing HBA of cynicism, Florida Trial Lawyers fails to understand the difference between cynicism and realism. While it does not go too far to suggest that no rules, statutes, or restrictions are necessary for the pure of heart, that ideal is not the reality. The difference between cynicism and realism is that cynicism assumes the worst and concludes it will remain so (or get worse). Reality recognizes the ideal but accepts human frailty and works to control it. Rules such as Rule 4-4.2 are calculated to control. HBA assumes the Rule's parameters will be observed and seeks only to clarify them. HBA's view is realistic, not cynical.

The ABA has also found it necessary to be realistic. The Model Rules of Professional Conduct would not exist otherwise, As early as 1934, the ABA explained that the purpose of the Rule was to preserve the proper functioning of the legal system and shield the adverse party from "improper approaches." ABA Formal Op. 108 (1934). In fact, the ABA has explained that the purpose of Rule 4.2 is to protect uncounseled lay persons against "overreaching by adverse counsel." ABA Formal Op. 95-396. In Informal Opinion 83-1498, the ABA Committee on Ethics and Professional Responsibility also explained that the Rule's prohibition was "necessary to preserve the proper functioning of the attorney-client relationship and to shield the party from improper approaches."

While IIBA certainly does not seek to be unduly pessimistic about Florida's legal practitioners, there is no reason to invite abuse. If no unnatural line is manufactured between employees and ex-employees for imputed liability, Rule 4-4.2 is allowed to fulfill its obvious goal of'protecting represented persons from overreaching. If that goal is not overly cynical

when applied to current employees, HBA fails to understand how it can become so just because the employment terminates.

F. Section 455.241 Is An Apt

Florida Trial Lawyers rejects HBA's statutory argument as inapt and claimed HBA "badly missed the point of the statute." (FTL 21-22). To the contrary. The Legislature created the statutory "privilege of confidentiality" to protect against the ex parte contact between a defense lawyer and a plaintiffs treating physician. *Acosta v. Richter,* 671 So. 2d 149, 150 (Fla. 1996). The legislative reaction was to this Court's earlier conclusion that there was no "general statutory privilege for the physician-patient relationship." *Id.* (citing *Coralluzzo* v. *Fuss,* 450 So. 2d 858, 859 (Fla. 1984)). "The primary purpose of the 1988 amendment was to create a physician-patient privilege where none existed before. . . ." *Id.* at 154 (emphasis added).

The physician-patient privilege created by section 455.24 1 is no more sacrosanct than the attorney-client privilege for potentially liable ex-employees that HBA suggests is created by Rule 4-4.2. And, contrary to Florida Trial Lawyers' analysis, it was the creation of the privilege that gave rise to the protection, not vice versa. (FTL 21-23). If this Court finds that Rule 4-4.2 creates an attorney-client privilege for ex-employees whose acts or omissions may be imputed to their former employer, just as section 455.24 1 created the physician-patient privilege, then the privilege exists--and the privilege gives rise to the Rule's protection.

G. The "Blockaded Investigation" Fallacy

The Estate and its amici all suggest that one of the serious problems created by HBA's interpretation of the Rule would be their inability to conduct investigations. FDLE, for instance, argues that it could not "gather information necessary for the enforcement of various statutes." (FDLE 5). FDLE explains that it often receives "vita information from

ex-employees," and that its ability to interview those ex-employees would deprive it of "invaluable information necessary to prove or disprove statutory violations." (FDLE 6). The Estate argues that allowing ex-parte communications screens non-meritorious cases and enables factual development. (AB 18- 19). Florida Trial Lawyers also urges that unlimited contact with ex-employees enables potential plaintiffs to avoid sanctions, such as those imposed by Federal Rule of Civil Procedure 11 , for filing frivolous lawsuits. (FTL 11-12). Those arguments all miss the point.

First, in response to FDLE, HBA would point out that the only limitation it seeks is on ex-employees whose "act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability," not mere ex-employee witnesses. Since those ex-employees suspected of* a criminal act or omission would be targets of FDLE's investigation, and since they may already have a right to counsel if they are targets of FDLE's investigation, it hardly seems unfairly restrictive to presume they are "represented" for purposes of the investigative process. See, *e.g., United States v. Four Star, 428* F.2d 1406, 1407, (9th Cir.), *cert. denied,* 400 U.S. 947, 91 S.Ct. 255, 27 L.Ed.2d 253 (1970) (prosecutor's use of statement obtained in custodial interrogation by law enforcement agent constituted ethical violation). The Sixth Amendment to the United States Constitution expressly forbids lawyers from "deliberately eliciting" information from a person who is represented unless the counsel is present or the right is waived. The protections provided by Florida's ethical code should be no less than those provided by the Constitution. On the other hand, ABA Rule 4.2 has been interpreted to not apply to non-custodial, pre-indictment communications between government lawyers and represented parties, so FDLE's concern may be unfounded in any event. *United States v. Ryans, 903* F.2d 73 1,740 (10th Cir.), *cert. denied,* 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d118 (1990).

The concerns expressed by the Estate and Florida Trial Lawyers are equally unfounded. (FTL 11-12). HBA's interpretation of the impact of Rule 4-4.2 during litigation does not prohibit discovery; it merely channels discovery through means approved by the Florida Rules of Civil Procedure. See *Boyd v. Pheo, Inc.*, 664 So. 2d 294,295 (Fla. I st DCA 1995) (order does not prevent discovery; it merely precludes use of investigative techniques less formal than those called for in rules governing discovery). Furthermore, HBA's interpretation of the Rule applies only to m-filing discovery, not to pre-litigation investigation. By the time suit is filed, the plaintiffs counsel should already have identified the potentially liable defendants, or the suit should not have been filed in the first place, Tf suit has already been filed, and ex-employees have already been targeted as potentially liable, then the plaintiff is not deprived of any investigation necessary to institute non-frivolous litigation.

Insofar as post-filing contact, HBA explained in its Initial Brief that the employer, also, would be bound to honor the no-contact rule until it is determined whether the ex-employee is within the protected class of persons whose acts or omissions may be imputed to the corporation to establish its liability. (IB 38). If the plaintiff has already made that determination, then the ex-employee is protected by the Rule. If the determination has not yet been made, discovery guidelines may be established by agreement or court order. If a court finds that an ex-employee should be protected, formal discovery is still available. And, even if, as Florida Trial Lawyers suggests, the corporation's lawyer is free to contact an ex-employee within the scope of the Rule, the contact is because an attorney-client relationship has been established, like the physician-patient relationship in section 455.241, and as contemplated by Rule 4-4.2. The Estate's argument that implementation of guidelines would somehow chill the ex-employee's desire to communicate is weak, particularly since the ex-

employees "whose acts or omissions" may be imputed to the corporation are themselves potentially liable for the harm claimed by the plaintiff. (AB 18).

The problem in this case is the tension between the discovery guidelines established by the Florida Rules of Civil Procedure and the scope of the attorney-client privilege. However, if the discovery guidelines are broad, as the Estate admits (AB 19), then imposing these broad guidelines on attorneys seeking discovery from ex-employees whose acts or omissions may impute liability to their former employers should not hamper development of the case. On the other hand, while failing to impose the discovery guidelines contained in the Florida Rules of Civil Procedure may be expeditious and cost-effective, those characteristics are neither hallmarks ofjustice nor benchmarks of ethical conduct.

CONCLUSION

For the foregoing reasons, Petitioner H.B.A. Management, Inc., respectfully requests that this Court disapprove the decision of the Fourth District Court of Appeal and approve *Barfuss v. Diversicare Corporation of America*, 656 So. 2d 486 (Fla. 2d DCA 1995).

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to the persons on the attached Service List, this 23 day of October, 1996.

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