

SUPREME COURT OF FLORIDA

CASE NO. 93,534

DIOSDADO C. DIAZ and DENNIS HABER, ESQ.,

Petitioners,

vs.

RINA COHAN DIAZ and LEINOFF & SILVERS, P.A.,

Respondents.

On Review from the Third District Court of Appeal,
Case No. 97-334

**AMENDED BRIEF OF AMICUS CURIAE
FLORIDA DEFENSE LAWYERS ASSOCIATION**

DAVID B. PAKULA, Esq.
P.O. Box 14519
633 South Andrews Avenue
Fort Lauderdale, Florida 33302
Telephone: (954) 463-0585

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Certification Regarding Type Size and Font

The typeface used in this brief is Times New Roman, proportionately spaced, 14 point.

I.

SUMMARY OF ARGUMENT

Trial courts should be not allowed to penalize attorneys for exercising their independent professional judgment regarding litigation decisions under the rubric of “inherent authority.” If courts are permitted to wield such authority, the sanctity of the attorney-client relationship will be imperiled.

An attorney has the ethical duty to zealously represent the client’s interests, unless the client’s position is frivolous or the litigation is being pursued for improper purposes. The lawyer’s duty exists even if it appears that the client may not ultimately prevail and even if the client refuses to accept a reasonable settlement offer. Attorneys should not be penalized for fulfilling their professional responsibilities.

The Third DCA’s decision creates a conflict of interest between attorney and client. A lawyer cannot be expected to face personal financial consequences of continuing litigation and at the same time exercise independent professional judgment when counseling the client regarding litigation decisions, such as the decision of whether to accept an early settlement offer.

The Third DCA’s decision also threatens the sanctity of confidential attorney-client communications. A trial judge should not be allowed to sanction an attorney for allegedly giving the client bad advice, when the attorney’s only line of defense

involves breaching attorney-client confidentiality by revealing what advice was given and the client's response to that advice.

Rather than contriving a procedure for allowing the attorney to reveal confidential communications in order to assert a defense, the FDIA believes trial courts should be prohibited from exercising "inherent authority" to penalize an attorney for what amounts to the exercise of independent professional judgment. There are more appropriate vehicles for policing attorney misconduct, such as bar grievance, contempt, 57.105 fees and malpractice proceedings.

II.

ARGUMENT

Allowing Trial Courts to Exercise Inherent Authority to Assess Fees Against a Litigant's Attorney for Alleged Errors in Professional Judgment Regarding Litigation Decisions Will Adversely Affect the Attorney-Client Relationship.

The Florida Defense Lawyers Association (FDLA) agrees with the arguments set forth in petitioner Dennis Haber's initial brief on the merits and will not repeat them here. Instead, this friend of the court brief will focus on a serious concern of members of the FDLA about the adverse effect of the Third DCA's opinion below on the integrity of the attorney-client relationship in the State of Florida.

The Third DCA's decision penalizes an attorney for allegedly failing to counsel the client to terminate the litigation by accepting an early settlement offer. This result invades the sanctity of the attorney-client relationship in several ways.

First, it conflicts with the attorney's ethical duty to zealously represent his client. The comment to Rule 4-1.3, Rules Regulating the Florida Bar, titled "Diligence," provides:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

Rule 4-1.16 provides that a lawyer must decline or terminate representation if the representation will result in a violation of the rules of professional conduct. It further provides that a lawyer may withdraw if, inter alia, (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services to perpetrate a crime or fraud; or (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.

Rule 4-3.1, titled "Meritorious Claims and Contentions," provides:

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....

The comment to the rule states:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for the client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an

extension, modification, or reversal or existing law.
(Emphasis supplied).

This court has stated: “The standard embodied in rule 4-3.1... is broad enough to encompass those cases where the claims are the result of innovative theories rather than... an obsessive attempt to relitigate an issue that has failed decisively numerous times.” The Florida Bar v. Richardson, 591 So. 2d 908 (Fla. 1991).

In view of the rules of professional conduct, a lawyer may in many situations have a duty to pursue a non-frivolous litigation position on behalf of a client even if it appears that the client may not ultimately prevail. Generally, at the outset of the representation the facts are unclear and the lawyer has a duty to develop the facts to determine whether they support the client’s position. A lawyer is not expected to be clairvoyant and turn down representation of a client whose position may be incorrect. Lawyers often find themselves in the position of having an ethical duty to raise a potentially unmeritorious claim or defense at a time when the claim or defense is procedurally required to be raised.

Penalizing an attorney who fails to advise the client to accept an early settlement offer conflicts with the attorney’s ethical duties. In the final analysis, it may appear that accepting the offer would have achieved a favorable result and would have avoided subsequent litigation. However, “hindsight is 20-20,” as the saying goes. At the time an early settlement offer is made, the client may decide to reject it based on a number of legitimate objectives, including a lack of sufficient information at the time of the offer. So long as the client does not wish to pursue the litigation for an improper purpose, such as harassment of the opponent, the lawyer may have a duty

to continue the representation with the required diligence and zealousness. That is true even if the client rejects the lawyer's advice to accept the settlement offer.

Another way in which the Third DCA's decision invades the attorney-client relationship concerns the inherent conflict of interest which the decision engenders. The lawyer is expected to zealously represent the client's interests. However, at the same time, the lawyer may be subjected to a fee award if the client does not accept an early settlement offer.

In view of the lawyer's duty to the client, he or she is expected to ignore the

potential for being penalized when counseling the client regarding a settlement offer. Nonetheless, the Third DCA's decision gives the lawyer a personal stake in the outcome of the litigation. One would need to disregard human nature to conclude that a lawyer can completely ignore the personal consequences of continuing the litigation. In any event, lawyers should not be placed in a situation in which they are forced to disengage concerns about possible financial consequences to themselves and their firms in order to zealously represent their client's interests. When such concerns come into play, the lawyer's independent professional judgement is imperiled.

A related problem resulting from the Third DCA's opinion concerns the sanctity of attorney-client communications. When an opponent makes a settlement offer, the lawyer and client have the opportunity to engage in confidential discussions of the pros and cons of accepting or rejecting the offer. Such discussions are strictly privileged. To strike at the confidentiality of these communications would be an assault at the sacred core of the attorney-client relationship.

Yet the Third DCA's decision does exactly that. When a trial judge accuses an attorney of failing to advise the client to accept a settlement offer, the attorney is duty-bound to refrain from defending himself by stating truthfully, "I told the client to accept the offer, but she refused." The Third DCA's opinion gives a trial judge the discretion to penalize an attorney for giving bad advice without providing any means for the attorney to defend himself.

The solution is not to contrive a procedure for allowing the lawyer to breach the attorney-client privilege in order to defend himself. The FDLA believes the solution

is to preclude a trial court from exercising “inherent authority” to penalize an attorney for what amounts to the exercise of independent professional judgment.

A court has certain implied powers to protect its ability to carry out the judicial function, such as the contempt power. However, those powers should not extend to the discipline of attorneys with regard to matters of professional judgment. There are existing measures to deal with such matters which are more suited to the task and which are subject to objective standards and procedures, such as bar grievance proceedings, legal malpractice actions and statutory fee awards under section 57.105, Florida Statutes (1999).

Respectfully submitted,

DAVID B. PAKULA, Esq.
P.O. Box 14519
633 South Andrews Avenue
Fort Lauderdale, Florida 33302
Telephone No.: (954) 463-0585

DAVID B. PAKULA
Florida Bar No.: 712851

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 9th day of December, 1999 to: **Helen Ann Hauser, Esq.**, 3250 Mary Street, Suite 400, Coconut Grove, Florida 33313; **Deborah Marks, Esq.**, 12555 Biscayne Boulevard, Suite 993, North Miami, Florida 33181; **Robert I. Barrar, Esq.**, 333 NE 23rd Street, Miami, Florida 33137; **Andrew M. Leinoff, Esq.**, 1500 San Remo Avenue, Suite 206, Coral Gables, Florida 33146; **Mark A. Gatica, Esq.**, 9130 South Dadeland Boulevard, Suite 1225, Miami, Florida 33156-7849; **Ky**

M. Koch, Esq., 200 North Garden Avenue, Suite A, Clearwater, Florida 33756; **M. Katherine Ramers, Esq.**, 1112 Pinehurst Road, Dunedin, Florida 34698; **Roy D. Wasson, Esq.**, 1320 South Dixie Highway, Suite 450, Gables One Tower, Miami, Florida 33146 and **Cynthia L. Greene, Esq.**, 9150 SW 87th Avenue, Suite 200, Miami, Florida 33176.

DAVID B. PAKULA