SUPREME COURT OF FLORIDA

THE FLORIDA BAR

RE: BECKER & POLIAKOFF, P.A. CASE NO. 97, 130

PETITIONER'S REPLY TO BRIEF ON BEHALF OF INTERESTED PERSONS

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IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NUMBER: 97,130

THE FLORIDA BAR RE:
BECKER & POLIAKOFF, P.A.

PETITIONER'S REPLY TO BRIEF ON BEHALF OF INTERESTED PERSONS

Petitioner, Becker & Poliakoff, P.A., hereby responds to the Brief on Behalf of Kathleen Burgener, Paul Wean and Robert Tankel as Interested Persons and, in support, states as follows:

BACKGROUND

Petitioner filed its petition with this Court on December 31, 1999, seeking this Court's review of Florida Rule of Professional Conduct 4-5.6, and Florida Bar Advisory Opinion 93-4, which addressed Rule 4-5.6.

Petitioner is a law firm that maintains eleven (11) offices throughout the State of Florida and employs many lawyers practicing across a spectrum of legal specialties. Although Petitioner does not enter into employment contracts with its associate attorneys, it does require the signing of an employment agreement for equity shareholders, non-equity shareholders, and attorneys placed in control of branch offices.

In 1989, Petitioner was the subject of a Florida Bar grievance involving its employment contract referred to above. As a result of the investigation, Petitioner revised its contract and the Florida Bar subsequently approved the

revised version. However, on February 17, 1995, the Florida Bar released Advisory Opinion 93-4, which, contradicting the Florida Bar's earlier approval of Petitioner's revised employment contract, declared portions of that contract unenforceable. Specifically, the opinion stated that the contract's provision that the firm would, for a period of two (2) years, be entitled to fifty percent (50%) of any fee recovered by a departing associate from any client of Petitioner was intended to restrict competition and was, thus, unenforceable.

Shortly after the release of Advisory Opinion Number 93-4, three of Petitioner's shareholders left their employ with Petitioner, directly citing that opinion verbally or in their respective letters of resignation.

On April 21, 1999, Petitioner sued the Florida Bar in Circuit Court in Fort Lauderdale, Florida. After institution of the lawsuit, counsel for Petitioner and counsel for the Florida Bar agreed to an abatement of that action and for Petitioner to, instead, seek review by the Florida Supreme Court in an original jurisdiction proceeding pursuant to Rule 1-4.2(a) and (c) of the Rules Regulating the Florida Bar.

On December 31, 1999, Petitioner filed a petition seeking this Court's review of the issue. The Florida Bar filed its response on or about January 5, 2000.

On August 30, 2000, Kathleen Burgener, Paul Wean, and Robert Tankel (the three departing lawyers mentioned above) filed a Motion for Leave to Appear and

Participate as Interested Persons. That motion was granted by this Court's Order of September 19, 2000.

On September 25, 2000, the three departing lawyers filed their Brief on Behalf of Kathleen Burgener, Paul Wean and Robert Tankel, as Interested Persons. That brief rails against Petitioner's brief, suggesting to this Court that:

***One,* financial disincentives to competition are functionally the same as prohibited covenants not to compete;**

***Two,* petitioner actually seeks revocation of Rule 4-5.6 of the Rules Regulating the Florida Bar;**

***Three,* the Fifth District Court of Appeals' decision in Miller v. Jacobs & Goodman, P.A., 699 So.2d 729 (Fla. 5th DCA 1997), does not control Petitioner's employment agreement;**

***Four,* the Miller decision is incorrect; and**

***Five,* public policy considerations require a rejection of a claim for impairment of contract.**

In this Response, Petitioner will demonstrate that:

***One,* law firms make a substantial, protectable investment in training and developing lawyers;**

***Two,* a balance must be struck between the competing interests of Rule 4-5.6 and the economic realities of the practice of law as a profession today;**

Three, **seeking reasonable compensation for investments made in departing attorneys in no way reduces clients to "chattel" or "property;"**

Four, **the Miller decision is, in fact, plainly applicable to the instant case; and**

Five, **it is in the interest of the profession and the public to modify Rule 4-5.6.**

ARGUMENT

F. Law firms make substantial investments in training and developing lawyers.

The Employment Agreement is *not* a "covenant not to compete" or even a "disincentive to compensation." What it is, is a reflection of the reality of operating a law practice. Law firms, regardless of size or type of practice, spend countless dollars investing in associates, senior associates and partners – including, training, providing offices, staff, equipment, personal development, and, most importantly – *clients.* The simple truth of the matter is that it is patently unfair to allow attorneys to reap the benefit of being trained and *invested* in – simply waiting until the fruits of that training ripen into a cognizable base of clients that the departing lawyer can ingratiate him or herself to and then be in a position to coax away from the firm. Regardless of motive, that is a patently inequitable result

G. A balance must be struck between the competing interests of Rule 4-5.6 and the economic realities of the practice of law as a profession today.

Surely there is a balance between the interest of a lawyer in practicing with *no limits*, as Respondent and the Interested Persons suggest, and the interest of law firms who must bear the risk that any departing lawyer will simply enjoy the training, infrastructure and personal development his or her law firm offers, and, if opportunity beckons, to simply pluck the most valuable, choice clients, confidently donning the Florida Bar's protective veil of protection to practice law "unimpeded."

Even the cases cited by the Interested Persons allude to a consideration for those actions that would harm the firm. In Pettingell v. Morrison, Mahoney & Miller, 687 N.E. 2d 1237 (S.C. Mass. 1997), the Court upheld summary judgment for plaintiffs because "the record contains no evidence that the plaintiffs' withdrawal harmed the firm in way that the court should recognize . . . ." The Pettingell court went on to hold:

> **There many be situations in which, although a forfeiture was inappropriate, some reasonable recognition of a law firm's loss due to the departure of a partner should be recognized. A law firm's legitimate interest in its survival and well-being might justify a limitation on payments to a withdrawing partner in particular circumstances, see Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 28-29, 607 A.2d 142 (1992), but that limitation would be more difficult to justify if it applied to a withdrawing partner who competes but not to all competing partners. See Denberg v. Parker, Chapin, Flattau & Klipl, 82 N.Y. 2d 375, 381, 604 N.Y.S.2d 900, 624 N.E.2d 995 (1993). A situation warranting an offsetting claim by a firm might arise when a departing partner leaves the surviving partners with onerous partnership debts, threatening the financial integrity of the firm. See Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601-6702 (Iowa 1990).**

Id. at 258.

In any event, the concept of complete and unadulterated "freedom of choice" is unrealistic. The same economic realities that dictate, or at least influence, the actions of law firms dictate or influence the actions of clients. Clients are forced to take into consideration such things as financial considerations, location, competency, and conflicts (personal as well as ethical) when choosing a lawyer. Thus, there is no *absolute* "freedom in choosing a lawyer" and, as a result, there must be some room to strike a balance between the competing interests of fostering a wide variety of choices in legal representation and the survival of the multi-lawyer law firms that form a large portion of the pool from which those potential clients will choose.

H. Seeking reasonable compensation for investing in departing attorneys in no way reduces clients to "chattel" or "property".

The Interested Persons' attempt to conjure the Court's sympathy by impugning that Petitioner would treat clients as "chattel" or "property" simply misses the mark. In no way does the entry of a reasonable employment agreement relegate clients to either chattel or property – simply because it does not give the law firm any more right to represent this client then does the departing lawyer, nor does it directly dictate the manner or cost of the new representation. What it does is exact reasonable reparation compensation for the firm's investment. Although Respondent and the Interested Persons have argued that such an employment agreement would indirectly affect the willingness of the lawyer to represent the client, this Court should not be constrained to ignore the economic realities of

practicing law based on *what might be* – especially considering that the lawyer would very likely not even be in a position to represent those clients – nor would the client likely have been in a position to desire representation by that lawyer – *but for* the investment made by the former employer.

I.The *Miller* decision is plainly applicable to the instant case.

In contending that the decision in Miller v. Jacobs & Goodman, P.A., 699 So.2d 729 (Fla. 5th DCA 1997), is either inapplicable or incorrect, the Interested Persons contend that:

(1) the language of Miller upon which Petitioner relies is merely dicta;

(2) the Miller plaintiffs were entitled to contingency fees as opposed to the hourly fees earned in the instant case;

(3) the Board of Governors of the Florida Bar declined to overrule Advisory Opinion 93-4 based on Miller's teachings; and

(4) this Court's decision in Chandris v. Yanakakis, 688 So.2d 180 (Fla. 1995) disapproved of cases cited by Miller.

First, the Fifth Circuit in Miller did, in fact, vacate an enforcement of the employment contract at issue in that matter. 699 So.2d at 735. However, the reason for vacatur was because of a problem the Court found with its liquidated damages provisions – not due to any public policy concerns. Id. In fact, the Miller court specifically stated:

> **In sum, *we hold* lawyers are free to enter into agreements, which provide for post termination allocation of client fees. *We reject***

M&R's argument that such agreements are unenforceable as against public policy because they place an undue economic burden on a client's freedom to choose legal representation.

Id. at 732. (Emphasis added). This certainly is not dicta.

Second, the issue of contingency fees as opposed to hourly fees was not even addressed by the Miller court. Id. Instead, the Interested Persons seek to inject into that holding a consideration, and, thus, a distinction, that was simply not present when that Court stated:

> If that client chooses to have M&R represent him or her, M&R [parties contesting employment] must simply make the decision whether to accept representation after considering such factors as the economics of representation, the effort required to bring the matter to a close, potential conflicts, inclination or competency to represent in that particular matter, or an infinite number of other factors that exist whenever an attorney is asked to accept representation. Some of these factors may preclude an individual from obtaining counsel of choice and the amount of compensation that an attorney may expect to realize from a particular engagement may be one of those factors.

Id. at 732. The Court in no way impliedly or expressly stated that the contingency representation of the Miller plaintiffs had any bearing on the outcome in that matter, in which the Court's determination – that reasonable employment agreements among attorneys are proper – was unequivocal.

Third, the unwillingness of the Florida Bar's Board of Governors to heed the teaching of Miller is of absolutely no binding consequence to this Court in making a determination of the law on this issue. The Florida Bar's unwillingness to reconcile with the reality of what the practice of law has become is precisely why this proceeding was necessary and why it was brought before this Court.

Fourth, this Court's 1995 disapproval, in the Chandris decision, of cases that were referred to in Miller in 1997,does not amount to a conflict between the holding of Miller and Chandris. Petitioner is confident that this Court will weigh all factors involved in the Fifth District's arrival at its holding in Miller – a holding which was in no way limited to the authority of the cases disapproved by Chandris, as well as the facts and circumstances that Petitioner has brought and which it posits sets forth strong public policy arguments for this Court to rule similarly to Miller in this case.

J.It is in the interest of the profession and the public to modify Rule 4-5.6.

There must be a guideline – one that would not necessarily revoke Rule 4-5.6 but, instead, simply relax this rigid and unrealistic standard that lawyers should enjoy his or her employer's investment, free with unbridled discretion to pick up and leave – soliciting valuable clients in the process and leaving the firm "holding the bag."

Indeed, public policy should be *strongly* considered in this situation. However, what public policy concerns dictate is that this State's citizenry would benefit from at least a relaxation, or elimination, of Rule 4-5.6. If this rule is allowed to stand unchanged and be interpreted as the Florida Bar has interpreted it, while not heeding the changing times, unaffected by the ever-increasing number of lawyers and the ever-increasing competition for clients, a sure result is that law firms' collective willingness to train and foster the personal development of associates and young partners will diminish. As smaller and moderate-sized

law firms that are the most affected by partners or associates departing with key clients de-stabilize, they will be forced to downsize the level of internal training and support simply because it will not be worth training lawyers who will likely, at some time in the course of their career, leave their employ and pick and choose the clients with which he or she leaves. Thus, tomorrow's lawyers, who will not have the benefit of this same, high level of training, support and professionalism, are likely to be less professional than lawyers of yesterday or today, for whom his or her law firm did not fear training, developing, and otherwise, *investing in.* This result could not possibly further any public policy.

To make matters worse, it is the small to medium size law firms that will suffer the most – law firms that are unable to absorb any type of appreciable client loss. The result will be a shrinking of small and midsize firms and a concomitant shrinking of the options available to the public in legal representation. Surely, that is a much more adverse impact on clients' collective ability to receive adequate representation than what Petitioner suggests – allowing a lawyer to represent whoever he or she wants and allowing a client to choose whoever he or she wants – but, simply expecting both of those parties to understand that if their relationship was spawned in whole or in part because of the efforts of the lawyer's former law firm, the departing lawyer must be willing to forego a portion of his or her fees to reasonably compensate the firm for its investment and to serve as reasonable disincentive to attorneys taking advantage of their employer.

Petitioner also respectfully requests that the Court keep in mind that this "restriction" in its Employment Agreement only lasts a short period of time while allowing the law firm to recoup at least a portion of its investment. At the very least, discuss before a client is allowed to be expatriated – a client who in many instances, did not hire the lawyer, but instead the law firm –, the firm should be given the right to at least first discuss representation options with the client before the departing lawyer takes advantage of the personal relationship established with the client to solicit the client's future representation.

CONCLUSION

Petitioner respectfully requests that this Court consider the arguments and citations to authority presented in its Response to the Brief on Behalf of Interested Persons in conjunction with the arguments and citations to authority contained in Petitioner's Initial Brief and rule in favor of the Petitioner in this matter as stated in the Request for Relief in Petitioner's Initial Brief.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioner's Response to Brief on Behalf of Interested Persons was furnished by facsimile and U.S. Mail this ____29th day of September, 2000 to Barry S. Richard, Esquire, HOLLAND & KNIGHT, Attorneys for the Florida Bar, 101 East College Avenue, Post Office Box 1838, Tallahassee, Florida 32302 and John B. Liebman, Esquire, O'NEILL, CHAPIN, LIEBMAN & COOPER, P.A., Attorneys for Interested Persons, Suite 865, 200 East Robinson Street, Orlando, Florida, 32801.

Respectfully Submitted,

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