SUPREME COURT OF FLORIDA

THE FLORIDA BAR

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

THE FLORIDA BAR'S RESPONSE

Jurisdiction

The Florida Bar agrees that this court has jurisdiction.

History Of Rule 4-5.6

The history of Rule 4-5.6 reflects a commitment by this, and most other high courts, to the preservation of professionalism in the practice of law. The rule was adopted by this court in 1986 from the identical American Bar Association Model Rule 5.6. The rule codified the essence of a 1961 American Bar Association ethics opinion which advised that it was unethical for attorneys to include restrictive covenants in contracts of employment with other attorneys. The ABA reasoned:

> Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. Any attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status.

ABA Formal Opinion 300 (1961).

Model Rule 5.6 has been adopted, verbatim or in substance, by most jurisdictions and, with one exception, the essence of the rule has been applied in every case in which the issue has been addressed.

E.g., Jacob v. Norris, McLaughlin & Marcus, 607 A.2nd 142 (1992) ("other states have almost uniformly shared New Jersey's dim view of restrictive covenants in employment agreements among lawyers.") See Caiaccio, "*Howard v. Babcock*, The Business Of Law

Versus The Ethics Of Lawyers," 28 G.a. . Rev. 807 (1994).

California is the single exception to the uniform application of the prohibition on restrictive covenants in attorney employment agreements. The policy reflected in Model Rule 5.6 and Florida's Rule 4-5.6 was abandoned by the majority of a split court in *Howard v. Babcock*, 28 Cal. Rptr. 2nd, 863 P. 2nd 150 (Calif. 1994), a case heavily relied upon by the Petitioner.[1] In a strong dissent from the *Howard* majority, Judge Kennard stated:

> I do not accept the majority's conclusion that "a new reality in the practice of law" justifies its erosion of legal ethical standards. Although the law is a business in the sense that an attorney in a law firm earns a living by practicing law, it is also and foremost a profession, with all the responsibilities that word implies. The ethical rule that this court is called upon to interpret exists to enforce the traditional and sound view that service to clients, including protection of the clients' ability to employ the attorneys they have come to trust, is more important than safeguarding the economic interests of established attorneys and law firms. I would enforce the rule according to the ordinary meaning of its terms to bar all agreements by which established firms seek to protect themselves against competition from attorneys who leave the firm.
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> I cannot accept that the practice of law has been so altered that it is now irretrievably profit-centered rather than client-centered. If ethical rules for attorneys must accommodate the "realities" of practicing law, then those realities ought to include this court's insistence that attorneys serve more than their own interests and accomplish more than amassing fees. Protection of the public and preservation of public respect for the law require no less.
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> One of the objectives beyond economic success that defines the law as a profession is the recognition that the attorney-client relationship requires the acceptance, within the bounds of ethical propriety, of the principle that the client's fundamental rights are superior to the interests of the attorney. The attorney-client relationship involves more than monetary considerations. An attorney is a fiduciary of the "very highest character." By the very nature of the relationship, an attorney owes the client a duty to act with the highest good faith. Consistent with the fiduciary nature of the relationship, the duty

[1] Petitioner cites *Howard* under its equal protection heading, discussed below. However, the *Howard* case did not involve an equal protection analysis.

of the attorney includes placing the interest of the client above his or her own interest.

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To enforce covenants not to compete is to exalt the economic interest of established law firms while necessarily disfavoring the rights of clients, especially the right to the attorney of one's choice. The majority's "confidence" that its decision will have no effect on the right of a client to the attorney of the client's choice is unrealistic.

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I have no quarrel with the majority's assertions that former partners sometimes "take" clients from law firms, that law firms have a financial interest in their clientele, or that law firms may be economically injured by the loss of clients. But the purpose of rules of professional ethics is to restrain and guide the conduct of attorneys and to protect the public, not to protect the financial interests of law firms. Accordingly, I cannot accept the majority's view that the protection of law firms justifies devaluing the rights of clients.

The majority has made no effort to show that because of the economic "revolution" in the practice of law it asserts has taken place, law firms in jurisdictions that do not allow restrictive covenants have suffered greatly. I am doubtful such evidence exists. * * * Although other businesses and professions permit noncompetition agreements, the rules applicable to other professions do not necessarily provide guidance for the legal profession. The nature, ideals, and practices of the various professions are different. Moreover, ethics is not a subject in which the objective is to achieve consensus at the level of the lowest common denominator. In my view, attorneys should strive to, and should be required to, meet the highest ethical standards.

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If the practice of law is to remain a profession and retain public confidence and respect, it must be guided by something better than the objective of accumulating wealth. Here, in refusing to enforce a rule of ethics that prohibits attorneys from entering into agreements that restrict their right to practice law after leaving a firm, the majority diminishes the rights of clients in favor of the financial interest of law firms based on its one-sided view of the realities and equities of the practice of law.

Id. at 863 P.2d 161-164. (internal citations omitted)

The majority view in *Howard* has failed to attract followers in other jurisdictions.

Virtually every court outside of California that has addressed the issue since *Howard* has rejected the California position. See *Pettingel v. Morrison, Mahoney & Miller*, 687 N.E. 2nd 1237 (Mass. 1997) ("courts have not been attracted to the contrary view expressed in *Howard v. Babcock* ***."); *Stevens v. Rooks Pitts and Poust*, 682 N.E. 2nd 1125 (Ill., 1st Dist. 1997); *Whiteside v. Griffis & Griffis*, 902 S.W. 2nd 739 (Ct. App. Tex. 1995) ("we are unwilling to follow this distinctly minority position and abandon the concept of client choice that we believe remains the premise underlying [the Texas rule]."); *Blackburn v. Sweeney*, 637 N.E. 2nd 1340 (Ct. App. Ind. 3rd Dist. 1994); See *Zeldes, Needle & Cooper v. Shrader*, 1997 (WL 644908 (Super. Ct. Conn. 1997); *Neuman v. Akman*, 715 A. 2nd 127 (D.C. Ct. App. 1998).

The Petitioner urges this court to align itself with the isolated position announced in *Howard v. Babcock*, and to embrace the California court's sad commentary on the state of the legal "profession." However, the Petitioner fails to present a persuasive legal or policy justification for such a radical abandonment of traditional ethical principles.

The *Miller v. Goodman* Decision

Petitioner urges this court to follow the reasoning of the Fifth District in *Miller v. Goodman*, 699 So. 2d 729 (5th DCA 1997). The case involved a challenge to a law firm's employment agreement that prohibited attorney associates from soliciting clients after departing the firm, and that entitled the firm to receive 75% of any fees earned from clients who followed the associates after they departed. The court held that the agreement was simply a "fee splitting agreement" that did not violate Rule 4-5.6. *Id.* at 699 So. 2d 732. The decision is inconsistent with the uniform interpretation given to identical or materially equivalent provisions in other jurisdiction, with the exception of California. Moreover, the

Miller opinion rests upon a flawed foundation. In support of its conclusion, the *Miller* court cited *Hessen v. Kaplan*, 564 So. 2d 184 (Fla. 3rd DCA 1990), and Florida Bar ethics opinions 94-1 and 84-1.

The *Miller* opinion cites *Hessen v. Kaplan, supra,* in support of its statement that "Florida courts are uniform in enforcing such fee splitting arrangements between lawyers and law firms." *Miller v. Kaplan* at 669 So. 2d 732. There is a material distinction between simple fee splitting agreements, which are designed to equitably allocate fees for work already done or work in progress when the attorney leaves, and agreements that are designed to prohibit or discourage competition by requiring departing attorneys to share fees for work done after leaving the firm. The *Hessen* case is a good example of the former. When a firm split into two separate firms, they entered into an agreement for the division of fees "from cases existing prior to the separation." *Id*. Prior to the separation, one of the lawyers had referred a case to an attorney outside the firm who successfully litigated the matter and returned a portion of the fee to the original firm. The dispute arose over the allocation of the fee among the former partners. The case had nothing to do with a restrictive convenant .

Similarly, Florida Bar Opinion 94-1 did not involve a non-compete or financial disincentive provision. The law firm and the departing attorney had entered into an agreement for the division of fees in connection with a particular case that the departing lawyer had handled while with the firm. After the lawyer left the firm, the firm settled the case (there is no suggestion that the client left with the departing attorney), and the question involved the portion of the fee to which the departing attorney was entitled.

Florida Bar Opinion 84-1, also cited in the *Miller* opinion, included a brief reference

to the fact that a "fee split arrangement between the associate and the firm in the event that a client of the firm elects to hire the associate," "is a matter of contract to be decided between the associate and the firm." There was no analysis contained in the opinion and, to the extent that it conflicts with Opinion 93-4, it has been superceded.

Neither the *Hessen* case nor the cited Florida Bar opinions lend support to the *Miller* opinion. In any case, this court is now called upon to make a policy decision which should not be influenced by the fact that a panel of one Florida appellate court reached a decision that is inconsistent with the plain language of Rule 4-5.6 and its uniform interpretation in all but one other state.

Equal Protection

The Petitioner asserts that Rule 4-5.6 and Opinion 93-4 deny the Petitioner equal protection because lawyers are treated differently from persons in other professions and occupations. Other than mentioning the distinction itself between lawyers and other business and professional persons, the Petitioner offers no explanation of why the prohibition fails to meet equal protection requirements.

It is well established that a statutory classification that does not proceed along suspect lines or infringe fundamental constitutional rights is analyzed under the rational basis standard of review. *Federal Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); *The Florida High School Activities Association, Inc. v. Thomas*, 434 So. 2d 306 (Fla. 1983). Pursuant to that standard, a provision must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *Id.* There are, of course, many circumstances under which lawyers are treated

differently than persons in other professions and occupations. Underlying most of these classifications is the understanding that lawyers fulfill a special responsibility in the administration of justice and have a fiduciary obligation to their clients unparalleled in any other field. The purpose of Rule 4-5.6 is stated in the comment to the rule:

> An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy, but also limits the freedom of clients to choose a lawyer.

Additional justification for the special treatment of lawyers is adequately presented in the above quoted excerpt from the dissenting opinion in *Howard v. Babcock*.

Impairment Of Contract

The Petitioner asserts that Rule 4-5.6 and Opinion 93-4 violate its constitutional rights by impairing the contractual obligations embodied in the disputed provision of the Petitioner's employment agreement.

The impairment of contract clauses of both the Florida and Federal constitutions apply only to legislative acts, not to judicial decisions. *Barrows v. Jackson*, 345 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953); *Fleming v. Fleming*, 264 U.S. 29, 44 S. Ct. 246, 68 L. Ed. 547 (1924); *State v. Greer*, 88 Fla. 249, 102 So. 739 (Fla. 1924). The rationale behind the limitation was explained by the Supreme Court in *Fleming v. Fleming, supra* at 264 U.S. 31:

> In *Tidal Oil Co. v. Flanagan* * * * we held that by a score of decisions of this court a judicial impairment of a contract obligation was not within section 10, art. 1, of the Constitution, since the inhibition was directed only against impairment by legislation * * *.
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> The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means.

The Court's reasoning in *Fleming* applies with equal force to the current

circumstances. Rule 4-5.6 was in effect prior to execution of Petitioner's employment contracts. The language of the rule is unambiguous. It prohibits a lawyer from participating in any "partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."

Opinion 93-4 interpreted Rule 4-5.6 to prohibit a contract provision which, while not a direct prohibition upon competition, imposed a significant financial disincentive to competition. That interpretation is a reasonable one and is consistent with a long and, with the exception of *Howard v. Babcock*, undisputed line of cases in other jurisdictions both before and after execution of the Petitioner's contracts. E.g.,*Stevens, Rooks Pitts and Poust, supra*; *Whiteside v. Griffis & Griffis, supra*; *Denburg v. Parker Chapin Flattau & Climpl*, 82 N.Y. 2d 375, 624 N.E. 2d 995, 604 N.Y.S. 2d 900 (Ct. App. N.Y. 1993); *Jacob v. Norris McLaughlin & Marcus, supra* ("the case law almost uniformly holds that financial disincentive provisions, like direct prohibitions, are unenforceable as against public policy."); *Gray v. Martin*, 663 P. 2d 1285 (Ct. App. Or. 1983); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W. 2d 598 (Iowa 1990). Because Rule 4-5.6 preexisted the subject contract clause and because Opinion 93-4 was not a legislative act, but simply an advisory opinion which was consistent with preexisting case law, the impairment clauses are not implicated.

Due Process

With no citation of supporting authority and no analysis, the Petitioner makes the conclusory statement that it was denied procedural due process because the Board of Governors adopted Opinion 93-4 without providing the Petitioner an opportunity to present evidence, call or cross-examine witnesses, or engage in discovery. The assertion is entirely without legal support. The due process clauses have never been interpreted to require that every affected person be accorded an evidentiary hearing prior to the enactment of legislation.[2] To the contrary, those few cases that have been called upon to consider the argument have soundly rejected it. See *San Diego Bldg. Contractors Ass'n. v. City Council*, 13 Cal. 3d 205, 118 Cal. Rptr. 146, 529 P. 2d 570 (1974); *Legislature of Rockland County v. New York State Public Service Comm'n*, 375 N.Y.S. 2d 650, 49 A.D. 2d 484 (3rd Dept. 1975); *Stones v. Plattsmouth Airport Auth.*, 193 Neb. 552, 228 N.W. 2d 129 (1975). Opinion 93-4 is simply an advisory opinion requiring no due process procedures. The Rules Regulating The Florida Bar provide the Petitioner with ample procedural due process rights prior to being subjected to any disciplinary sanctions for violation of rule 4-5.6.

Estoppel

The Petitioner's final argument is that The Florida Bar should be estopped from asserting that the disputed provision of Petitioner's employment contract is a violation of any ethical rule. The assertion is based upon the Petitioner's contention (which is accepted for purposes of this memorandum) that a member of the Bar's disciplinary staff approved the

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[2] While Rule 4-5.6 is not an act of the Legislature, it is legislative in character and constitutes an exercise by this court of its quasi-legislative authority under Article I, Section 15 of the Florida Constitution.

disputed language in the Petitioner's employment agreement in 1989.

This court has consistently held that equitable estoppel will be applied against the state only in rare instances and under very exceptional circumstances. *State Dept. of Revenue v. Anderson*, 403 So. 2d 397 (Fla. 1981); *North American Company v. Green*, 120 So. 2d. 603 (Fla. 1960); *Bryant v. Peppe*, 238 So. 2d 836 (Fla. 1970). The plaintiff in *North American Company v. Green, supra,* in a claim similar to the Petitioner's, argued that the state comptroller should be estopped from collecting a tax from the plaintiff because the comptroller, in accordance with an opinion of the Attorney General, had previously taken the position that the tax was not collectable. The court refused to apply the doctrine of equitable estoppel to prohibit collection of the tax.

The Petitioner is charged with knowledge of the Rules Regulating The Florida Bar and, in particular, that portion of the rules designated Florida Bar Procedures For Ruling On Questions Of Ethics. Rule 2 (c) of the Ethics Rules expressly provides that, "staff opinions are advisory only * * *." Rule 8 empowers the Professional Ethics Committee to "approve, overrule, or set aside any staff opinion," and the action of the Committee is always subject to modification or reversal by the Board of Governors or this court. If the Petitioner chose to rely upon an opinion of staff counsel, it did so at its peril. While compliance with a staff opinion might be a mitigating factor in a disciplinary proceeding, it cannot serve to bind the Bar and this court with respect to the enforcement of important public policies.

If the Petitioner's estoppel argument were sound, the informal opinion of every staff attorney would have final binding effect as to any lawyer claiming to have relied upon it. Nothing in the rules, the decisions of this court, or the historic application of the estoppel

doctrine suggests that the State of Florida can be bound by a single staff lawyer with respect to an essential policy issue.

The court is respectfully urged to deny the petition and to continue its commitment to the higher standard of professionalism embraced by all but one jurisdiction in this country.

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CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was furnished by U.S. Mail to Gerald F. Richman, Esq., Pillips Point - East Tower, 777 South Flagler Drive - Suite 1100, West Palm Beach, Florida 33401 this 5th day of January, 2000.

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BARRY RICHARD

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