IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ARNOLD, MATHENY & EAGAN, P.A.,

Petitioner,

v.

CASE NO.: SC07-1136
LOWER TRIBUNAL NO: 2D06-317

FIRST AMERICAN HOLDINGS, ET AL.,

Respondent(s).
_____/

ON A CERTIFIED QUESTION FROM
THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner refers to Arnold, Matheny, & Eagan, P.A. as "AME."

Petitioner refers to First American Holdings, Inc. as "FAH."

Petitioner refers to Preclude, Inc. as "Preclude."

Petitioner refers to Preclude's settled lawsuit against Greenleaf Products, Inc. as "Preclude Settlement."

Petitioner designates references to the record on appeal by the prefix "R" followed by the corresponding page number and "V" for the volume.

STATEMENT OF THE FACTS

On June 14, 2002, Preclude, Inc. ("Preclude"), represented by Petitioner here, the law firm of Arnold, Matheny & Eagan, P.A., ("AME"), settled a lawsuit against Greenleaf Products, Inc. ("Preclude Settlement"). (R. 143-44, V. 1). At the time of the Preclude Settlement, Preclude was indebted to Respondent First American Holdings, Inc. ("FAH") in the amount of $26,000. This indebtedness arose from a stipulated judgment in a pending, unrelated matter on FAH's counterclaim against Preclude and third party complaint against Mike Cameron, a Preclude principal (the "pending action"). (R. 61-64, V. 1).

Prior to AME's receipt of the Settlement Check, on June 19, 2002, FAH obtained and served a writ of garnishment on AME ("the First Writ"). (R. 68, V. 1). Because AME had not received any Preclude settlement monies, AME answered the First Writ upon receipt, asserting that it had neither possession nor control of any property belonging to Preclude. The First Writ is not the subject of this appeal. (R. 68, V. 1).

On June 21, 2002, AME received a trust check from Peterson & Myers, the law firm representing Greenleaf Products, for the full Preclude Settlement amount of $50,000. (R. 191-92, V. 1). That same day, AME did the following:

1. Promptly deposited the check into its trust account at First Union National Bank, n/k/a Wachovia Bank (R. 123, V. 1);

2. Issued two checks on its trust account. Check number 13450 in the amount of $23,263.76, was issued to Preclude, Inc., representing the settlement proceeds due to Preclude ("the Settlement Check"), and check number 13451 in the amount of $26,736.24, was issued to "Arnold, Matheny & Eagan, P.A., Operating," representing Arnold, Matheny's attorneys' fees and costs in representing Preclude (R. 119, V. 1); and

3. Delivered the Settlement Check to Mike Cameron of Preclude (R. 299, V. 2).

Four days later, on June 25, 2002, FAH obtained and served a writ of garnishment on AME. (R. 79, V. 1; R. 82, V. 1). AME answered the writ stating that "[A]s of the date of this Answer . . .and all times in between, [AME] was not indebted to . . . Preclude, Inc. or . . . Mike Cameron" and was "not in possession of any sums of tangible or intangible personal property nor was it in control or possession of any property of [Preclude or Cameron] from the time of the service of the writ to the time of this Answer." (R. 79, V. 1). Subsequently, on June 28, 2002, the Settlement Check cleared the bank and was paid by First Union National Bank. (R. 257, V. 2).

The record does not reveal when Preclude's representative presented the Settlement Check to the bank for payment because the date stamp on the check is illegible. (R. 205, V. 1; R. 337, V. 2; R. 339, V. 2).

FAH then proceeded in the trial court and ultimately filed its Notice of Appeal to the Second District on January 17, 2006. (R. 374-77, V. 2).

STATEMENT OF THE CASE

On May 11, 2007, the Second District Court of Appeal ("Second District") reversed the trial court's order dissolving the writ of garnishment against AME, certified a question of great public importance, and remanded the case for further proceedings. On July 9, 2007, the Supreme Court of Florida accepted jurisdiction of this case.

In the trial court, the parties filed (approximately three years after the case commenced) motions for summary judgment seeking the trial court's determination of whether the attorney trust account check delivered to a client, which represented the settlement proceeds of the client, could be considered in the "possession or control" of AME at the time of service of a writ of garnishment; thereby, rendering AME liable to FAH and First American Investment Banking Corporation (collectively "First American") for the full amount of the Settlement Check. (R. 291-95, V. 2; R. 271-84, V. 2). AME contended in its motion that, once the Settlement Check was delivered to Preclude on June 21, 2002, AME no longer had "possession or control" of the funds and, therefore, had no duty to stop payment. (R. 294-95, V. 2). FAH argued that AME was liable to FAH because AME had possession and control of the Settlement check until it cleared and was

finally paid by the bank, after service of FAH's writ of garnishment on AME. (R. 271-84, V. 2). In prior papers, FAH argued, in contrast to their argument in summary judgment proceedings, that once a settlement check is mailed (or "en route") to the intended recipient, it is no longer in the possession or control of its issuer.[1] (R. 87, V. 1).

At a hearing on the parties' motions held November 9, 2005, the trial court stated that the issue presented "goes to the very nature of what an attorney is in this situation, as the custodian of the client's funds in the trust account . . ." (R. 363-64, V. 2). On December 15, 2005, after taking the matter under advisement, the trial court granted AME's motion for summary judgment and dissolved the writ of garnishment. (R. 373, V. 2). From this judgment, FAH filed notice of appeal on January 17, 2006. (R. 374-75, V. 2).

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[1] FAH replied to AME's first and second answers on July 12, 2002, denying the answers and stating that "[r]egardless of the precise time of service of the First Answer, settlement proceeds intended for Preclude, Inc. and/or Mike Cameron had been *mailed to, were en route to,* and/or had been received by garnishee [AME] at or prior to the time of service of the First Answer. Accordingly, garnishee [AME] was indebted to Preclude, Inc. and/or Mike Cameron and further had tangible or intangible personal property of Preclude, Inc. and/or Mike Cameron in its possession or control at the time of service of the First Writ or at any time between the service and the time of the garnishee's First Answer, at least to the extent that the settlement proceeds are deemed to have no longer been in the possession or control of garnishees Greenleaf Products, Inc. and/or Peterson & Myers, P.A." (R. 87).

The matter proceeded in the Second District, which rendered a decision in favor of FAH, with opinion. *First American Holdings, Inc. v Preclude Inc.*, 955 So. 2d 1231 (Fla. 2d DCA 2007). The court held that it is an attorney's duty to issue a stop payment order for a check drawn on his or her trust account and delivered to the payee prior to the receipt of a writ of garnishment if the writ occurs prior to the presentment of that check for payment to the attorney's bank. *Id*. The Second District certified the following question to be of great public importance.

CERTIFIED QUESTION

DOES AN ATTORNEY GARNISHEE HAVE A DUTY TO ISSUE A STOP PAYMENT ORDER FOR A CHECK DRAWN ON HIS OR HER TRUST ACCOUNT AND DELIVERED TO THE PAYEE PRIOR TO THE RECEIPT OF A WRIT OF GARNISHMENT IF THE SERVICE OF THAT WRIT OCCURS PRIOR TO THE PRESENTMENT OF THAT CHECK FOR PAYMENT TO THE ATTORNEY'S BANK?

SUMMARY OF ARGUMENT

This Court, respectfully, should not impose a duty on an attorney garnishee to issue a stop payment order on his or her trust account check that has been delivered to his or her client/payee, prior to receipt of a third party's writ of garnishment.

The imposition of such a duty would impinge upon the dignity of the legal profession and the sanctity of the attorney/client relationship, and potentially invoke complex ethical dilemmas pertaining to other clients, whose funds reside in the attorney's trust account, or third parties which have received the check in the ordinary course of commerce. It would also impair provisions of the Rules Regulating The Florida Bar pertaining to the attorney/client relationship, and trust fund settlement and disbursement.

No court in this land, to our knowledge, has ever imposed such a duty on an attorney garnishee (save the Second District in this case). In fact, the only courts that are known to have ruled on the attorney trust account check and stop-payment order issue (Georgia and Maine) have denounced the idea of such a duty.

In addition, the majority of jurisdictions deciding the issue in its broadest sense, that is, in the general realm of non-bank garnishees, have also refused to impose such a duty on *all* non-bank garnishees -- be they attorneys or businessmen, tinkers or stateswomen. This is true, in Georgia, Kansas, Illinois,

New Mexico, Missouri, Texas, Ohio, Pennsylvania, Maine, and West Virginia, for example. In fact, Honorable Barry J. Stone, of our Fourth District Court of Appeal (the only Florida jurist ever known to comment on the matter in written opinion) has pronounced the better policy to be that a non-bank garnishee does not have a duty to stop payment on checks that have been issued and delivered in discharge of an obligation.

The impropriety of imposing the duty upon attorney garnishees, envisioned by the Second District below, is apparent when one contemplates what an attorney's trust account check represents. The attorney's trust account check is akin to a "cashier's check." It is considered by clients and the community as the "word and bond" of the attorney that funds exist to support the check. This, because of the exceptional stature of the attorney's trust account and the fact that a trust account check is subject to immediate disbursement of funds under the Rules Regulating The Florida Bar; notwithstanding, that the deposit has not been finally settled and credited to the account. This, also because the attorney is merely a keeper and protector of client funds within his trust account and must disburse promptly upon demand of the client-owner.

Yet, because of the opinion below, an attorney may no longer rely on another attorney's trust account check until the attorney insures the check represents "collected funds" -- in derogation of specific provisions of the Rules

that permit such reliance. Because of the opinion below, and the obligation imposed, the use of trust account checks for distributing closing or settlement funds will be seriously impeded. Once again, in derogation of the rules.

Nothing, we submit, in garnishment law imposes such a duty or would warrant such disruption of the attorney/client relationship, the sanctity of the trust account check, or the impingement upon this Court's regulatory rules. The garnishment statutes (Chapter 77, Florida Statutes) represent an opportunity for a judgment holder to garnish tangible or intangible personal property of the debtor which reside in the "possession and control" of a third party. The garnishment law does not mandate that the third party place a stop payment order upon a check which the third party has delivered and pledged in response to obligation to the judgment debtor, prior to receipt of an enforceable writ of garnishment. The funds represented by such check, post-delivery, are considered a suspended obligation.

In fact, the law in other regards would specifically decry imposition of such duty—particularly, as noted, for the attorney who travels under the rules regulating the bar as well as under the general commercial rules which provide delivery of check to payee creates an implied agreement that the check will be honored when presented. The fact that the Florida Uniform Commercial Code permits a banking customer to stop payment on a check (section 674.403, Florida Statutes) in order to prevent, for example, an overdraft on insufficient funds, or to stop payment to a

scofflaw who has not performed as contracted with the customer, does not invoke the "possession or control" concept as envisioned by the garnishment law—particularly when referring to delivered, attorney trust account checks.

Once the attorney delivers the trust account check to the client, the attorney, who was entrusted with the funds for a specific purpose, has fulfilled the inherent obligation within our rules to distribute promptly upon demand. As has been noted, upon distribution, the attorney must assume that the recipient of the trust account check will present such check for immediate payment. The delivered trust fund check does not fall under any concept of control by the attorney at any regulatory level under the Rules Regulating The Florida Bar. The attorney cannot be required to stop payment on a delivered trust account check based upon a subsequently served writ of garnishment—just as a bank cannot be required to stop payment on a cashier's check. Both carry with them a heavy weight, a mark of distinction, of being considered to be the funds the paper represents. Put simply, the decision below opens a "Pandora's box" for the bench and bar of this state. We request this Court reseal the lid, return our trust accounting to its post-decisional undisturbed state, and decline an affirmative answer to the question posed below.

For all of these reasons, and as more fully set forth in following sections, Petitioner, the law firm of Arnold, Matheny & Eagan, P.A. ("AME"), respectfully,

requests that this Court answer the question certified below with a resounding, "NO."

STANDARD OF REVIEW

The issue before the Court is the proper interpretation of the Florida garnishment statute. A question of statutory construction is a question of law. A question of law is reviewed *de novo* by the Court. *See City of Gainesville v. State*, 863 So. 2d 138 (Fla. 2003); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000). *See also Jackson County Hospital Corporation v. Aldrich*, 835 So. 2d 318 (Fla. 1st DCA 2002), *review granted by Bay Anesthesia, Inc. v. Aldrich*, 847 So. 2d 975 (Fla. 2003) (appellate court reviews trial court's interpretation of statute under *de novo* standard).

ARGUMENT

ATTORNEY GARNISHEE DOES NOT HAVE A DUTY TO ISSUE A STOP PAYMENT ORDER ON HIS OR HER TRUST ACCOUNT CHECK THAT HAS BEEN DELIVERED TO THE PAYEE PRIOR TO THE RECEIPT OF A WRIT OF GARNISHMENT - EVEN IF THE SERVICE OF THAT WRIT OCCURS PRIOR TO THE PRESENTMENT OF THAT CHECK FOR PAYMENT TO THE ATTORNEY'S BANK.

We submit the Second District erred in finding an attorney owes a duty to a third party, when served with writ of garnishment, to issue a stop payment on a trust account check delivered to a client. Such a duty does not comport with the special and essential requirements of the attorney/client relationship, this Court's

rules regulating trust accounts and the legal profession, nor is it legislatively mandated by Florida garnishment law. In fact, the decision of the Second District (which is one of first impression in this state) does not comport with longstanding precedent on the issue in the majority of other jurisdictions throughout the United States. Respectfully, this Court should decline to follow the determinations made in the opinion below.

Pursuant to the Second District's opinion, every time an attorney has a client's funds in his or her trust account and receives a writ for garnishment of that client's funds, that attorney must immediately stop payment on all trust account checks written on these funds -- even if the trust checks were delivered to that client and/or third parties, before the writ was received. This requirement will negatively impact the attorney/client relationship, the practice of law, and the management of a law office, as well as impinge the dignity of the legal profession, as will be fully described herein.

Petitioners, the law firm of Arnold Matheny and Eagan, P.A. ("AME") respectfully request this Court reverse the decision of the second DCA.

A. The Certified Question Presented In This Appeal Is One Of Great Public Importance

As a result of the Second District's ruling in this case, it may no longer be reasonable or prudent for an attorney to rely on another attorney's trust account check until he or she has confirmed with the bank that the trust account check is

"collected funds." Even though this Court's Rules Regulating The Florida Bar control attorney's trust accounts and checks issued thereon, the Second District's opinion did not cite to any of these Rules to support its decision. The Second District's decision, which created the obligation, will seriously impede the use of attorney trust account checks as the instrument for distributing closing or settlement funds. The decision conflicts with this Court's Rules which deem trust account checks to be one of the exceptional instruments upon which an attorney may immediately disburse funds to a client prior to final settlement of funds; and, conflicts with the attorney's mandatory duty to promptly distribute to clients, for example. *See* R. Reg. Fla. Bar 5-1; *In re Amendment to Integration Rule*. 467 So. 2d 704 (Fla. 1985).

Prior to this ruling, an attorney who delivered a trust check implicitly, if not expressly, represented that the funds were available when the check was delivered. Now, an attorney may have exposure to the parties that received and accepted the check from, at least, an ethical perspective. The attorney that received and accepted another attorney's trust account check may be liable to his or her client (and others) for not advising of the risk that a "stop payment" order may prevent payment on the trust check. The attorney that deposits another attorney's trust account check in his or her trust account and draws trust account checks on these funds will have exposure to all other clients that have funds in the trust account.

Additionally, the attorney will have exposure to all other persons who have received delivery of the trust check or payment in reliance on its status as collected funds, if a subsequent stop payment order prevents collection on the first attorney's trust account check as a result of service of a writ of garnishment after the check is delivered.

B. Attorney Trust Account Checks Delivered To Client Should Not Be Subject To Garnishment Because Of The Unique And Special Obligations Of The Attorney/Client Relationship.

Allowing garnishment of delivered attorney trust account checks, through mandated stop payment orders, appears to conflict with the intent of this Court's mandated Rules Regulating The Florida Bar. The Rules require a lawyer to "hold in trust . . . funds and property of clients . . . that are in a lawyer's possession in connection with a representation." R. Regulating Fla. Bar 5-1.1(a)(1). Furthermore, money that is "entrusted to an attorney for a specific purpose . . . is held in trust and must be applied only to that purpose . . . ." R. Regulating Fla. Bar. 5-1.1(b). In essence the attorney does not "own" the trust account funds – the client does. Specifically, under the Rules, although an attorney temporarily "possesses" the client's funds, a client clearly retains "control" over his or her trust funds at all times. The clients' right to control, and ultimately possess funds owed to them, imposes a mandatory duty upon lawyers to promptly distribute to the client any portion of money received from a third party that is not subject to

dispute over counsel's fees. R. Regulating Fla. Bar R. 5-1.1; *In re Amendment to the Rules Regulating the Florida Bar*, 875 So. 2d 488, 534-35 (Fla. 2004). Moreover, upon prompt distribution to the client,

> [a]n attorney must assume that the recipients of checks drawn upon his trust account will present such checks for payment immediately at the drawee bank.

In re Amendment to the Integration Rule, 467 So. 2d at 704. (emphasis added).

To comply, an attorney must immediately debit the client's account for the amount of the check delivered to the payee and deem the money in the account paid to the payee no longer subject the attorney's control. Therefore, once the check is delivered, the subsequent events with respect to the check (such as whether the check has been in fact presented or perhaps endorsed by the payee to a third party) are not within the control of the attorney, absent a requirement imposed by law to exercise some control over the disposition of the check before actual payment.

Further, lawyers are permitted to accept another attorney's trust account checks, along with other highly reliable instruments as noted in the Rules Regulating The Florida Bar, before the funds are finally settled and credited to the lawyer's trust account if, "the lawyer has a reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time". *Id.* at 704-05; R. Regulating Fla. Bar 5-1.1(i).

(The Rule Regulating the Florida Bar 5-1.1(i) is cited as it appeared in June 2002, the pertinent time frame in the case at bar. However, Rule Regulating The Florida Bar 5-1.1(i) now appears as 5-1.1(j).) This Rule provides an exception to the general principle that trust account funds cannot be disbursed unless the funds are deposited, finally settled, and credited to the lawyer's trust account. *See* R. Regulating Fla. Bar 5-1.1(i) (2002). Without this permissible exception, lawyers could forseeably use the funds of other clients for an unauthorized purpose, *i.e.* the disbursement of their funds to other clients. *In re Amendment to the Integration Rule*, 467 So. 2d at 705. Rule 5-1.1(i) of the Rules Regulating The Florida Bar provides in pertinent part:

> . . . a lawyer may not disburse funds held for a client or on behalf of that client unless the funds held for that client are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer's trust account. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit:
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> . . .
>
> (4) when the deposit is made by a check drawn on the trust account of a lawyer licensed to practice in the state of Florida or on the escrow or trust account of a real estate broker licensed under applicable Florida law when the lawyer has a reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;

(emphasis supplied.)

These ethical obligations, and the attendant rules, have clearly given attorney's trust account checks a special status and a degree of certainty under the law, similar to "certified checks" or "cashier's checks." In essence, the Rule requires an attorney (1) to treat the trust account check which he or she has issued as a paid instrument, debited against the account immediately upon delivery; and, (2) to issue such a check only against collected funds in the account, unless the attorney has a reasonable and prudent belief that the funds will clear and constitute collected funds. Therefore, the drawee[2] bank, payees[3], and assignees[4] by endorsement of such checks can and do accept the checks as checks drawn on clear funds and give the attorney's trust checks a special status in the community. Given that the attorney's trust account check travels in commerce with a special status, and the obligations that attorneys owe to their clients to hold their funds in "trust," immediately disburse funds, and anticipate immediate presentment at the bank, it would be illogical and contrary to Florida ethics principles to require a lawyer to

[2] § 673.1031(1)(b), Fla. Stat. (2007): "Drawee means person ordered in a draft to make payment."

[3] Payee – "one to whom money is paid or payable; esp., a party named in commercial paper as the recipient of the payment." Black's Law Dictionary (8th Ed. 2004).

[4] Assignee – "one to whom property rights or powers are transferred by another…" Black's Law Dictionary (8th Ed. 2004).

stop payment on a trust account check once it has been delivered to the client in order to satisfy a writ of garnishment.

While there may be limited circumstances in which a lawyer may refuse to surrender property to the client based on a duty imposed by law to protect creditor's claims, such a duty simply must not apply to a properly delivered trust account check – given the potential consequences. *See In re Amendment to the Rules Regulating the Florida Bar*, 875 So. 2d at 534. Indeed, considering the heightened stature of an attorney's trust account check, and the penalties associated with mismanagement of trust funds, an attorney should not be required to stop payment on a trust account check, just as a bank can not be required to stop payment on a cashier's check. *See, e.g., Behavioral Health and Wellness, Inc. v. FDIC*, 802 So. 2d 374, 376 (Fla. 3d DCA 2001) (bank had no right to stop payment of cashier's check); *Crosby v. Lewis*, 523 So. 2d 1154, 1156 (Fla. 5th DCA 1988) (The purchaser of a cashier's check did not have any right to order a bank to stop payment when the cashier's check is presented.)

In *Warren Finance, Inc. v. Barnett Bank of Jacksonville. N.A.*, 552 So. 2d 194, 195, 196 (Fla. 1989), this Court stated:

> It is important to discuss the purpose and use of a cashier's check to determine the respective rights and liabilities of parties to that check. The purpose of a cashier's check is to act as a cash substitute in dealings between parties. Parties using cashier's checks in place of ordinary checks or instruments do so because cashier's

> checks do not carry the risk of litigation costs or insolvency…. Frequently used in business transactions, cashier's checks add a degree of certainty to dealings between parties. A cashier's check, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank. *Pennsylvania v. Curtiss National Bank*, 427 F.2d 395 (5th Cir.1970); *Riverside Bank v. Maxa*, 45 So.2d 678 (Fla.1950); *Crosby v. Lewis*, 523 So.2d 1154 (Fla. 5th DCA 1988). People accept a cashier's check as a substitute for cash because the bank stands behind the check, rather than an individual. *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A. 2d 327 (1970).
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> Because the bank, and not the drawer, is personally liable, the holder of a cashier's check knows that upon presentment the issuing bank will honor its obligation. Therefore, the public uses cashier's checks because they are a reliable vehicle for transferring funds, are as freely transferable as cash, and are free of the risks of loss and theft that accompany cash. When used in place of a personal check or other negotiable instrument, the parties' expectation is that the cashier's check will remove all doubt as to whether the instrument will be returned to the holder unpaid due to insufficient funds in the account, a stop payment order, or insolvency.

Much of the same can be said regarding attorney's trust account checks. For example, under Rule 5-1.1(i), *supra*, an attorney can avoid being guilty of professional misconduct only by personally paying the amount of a failed deposit on which the attorney drew an attorney trust check. Clearly, the attorney's personal liability for the trust account check is substantially similar to the bank's corporate liability for the cashier's check. "[T]he parties' expectation is that the

cashier's check will remove all doubt as to whether the instrument will be returned to the holder unpaid due to insufficient funds in the account, a stop payment order, or insolvency." *Warren Finance* at 196. In essence, the bank is "guarantying" payment on a cashier's check and the attorney is similarly "guarantying" payment on his or her trust account check. Consequentially, parties to a particular transaction and the community's expectation in general as to the delivered attorney's trust account check, has been, and until the action of the Second District, should be, the same as with the cashier's check -- it will not be returned to the holder due to insufficient funds, a stop payment order, or insolvency. The instrument is, indeed, drawn on and constitutes payment by clear funds.

The Uniform Commercial Code, as adopted in Florida, defines a "cashiers check" as "… a draft with respect to which the drawer and drawee are the same bank or branches of the same bank." §673.1041(7), Fla. Stat. (2007). A "check" is defined as "…a draft, other than a documentary draft, payable on demand and drawn on a bank or a cashier's check or teller's check." §673.1041(6), Fla. Stat. (2007). A "cashier's check" and a "check" are clearly distinguishable. The Uniform Commercial Code is silent in regards to the definition of an attorney trust account check, because attorney trust account checks are defined and regulated through the Rules Regulating the Florida Bar. *See* R. Regulating Fla. Bar 5-1.1. As

discussed above, an attorney is responsible for a trust account check in the same manner as a bank is responsible for a cashier's check.

Moreover, to stop payment on an attorney's trust account check that has already been delivered to a client would undermine the attorney/client relationship by diminishing the fiduciary duty an attorney owed to a client and would violate the duty owed by every attorney to uphold and assure the dignity and reliability of trust account checks. The "Comment" in Rules Regulating The Florida Bar 5-1 (2002) provides "A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client…and, where appropriate, the lawyer should consider the possibility of depositing the property or funds in the dispute into the registry…" On the other hand, The Florida Bar, *Ethics Opinion* 60-34 (March 28, 1961) provides the following guidance to inquiry concerning whether an attorney should forward the funds to his client without advising third party creditors to garnish the funds, or should he interplead them:

> It is improper for an attorney to advise his client's creditors that he holds funds due to the client so that such creditor may proceed against them, nor is it proper for the lawyer to interplead such funds. It is the lawyer's duty to represent his client with undivided fidelity and to preserve his confidences.

We do not think this Court intended, or intends, a retreat from this pronouncement. Yet, the Second District's opinion here improvidently raises such spector. In the present case, when AME received the first writ of garnishment, it

acted appropriately under the ethical rules by stating it did not have funds because it did not have any of its client's funds within its possession or control. AME would have breached its "undivided fidelity" and not "preserved [the client's] confidences," if AME informed its client's "creditor" that proceeds might be received in the future. When AME received the second writ of garnishment, it also acted appropriately under the rules by stating that it did not have possession or control of funds because it had delivered its attorneys trust account check to the client four days earlier. AME ethically could not inform its client's "creditor" that it had delivered proceeds to its client four days before the second writ was received.

The only decision located squarely on point with the precise issue at bar, holds that an attorney served with a writ of garnishment has no duty to stop payment on a trust account check once it is delivered to the client. *Hiatt v. Edwards*, 182 S.E. 634, 635-36 (Ga. Ct. App. 1935). In *Hiatt*, the court addressed "whether the delivery of a check by the attorney to his client, representing as it did an order on the bank for the transfer by the bank of a fund belonging to the client, would render the fund free from process of garnishment of the attorney by a creditor of the client." *Id*. at 635. The court found:

> **the deposit was a trust fund actually belonging to the client . . . [and] the purpose of the check was not to pay a debt or make an assignment of the title, but merely to relinquish the attorney's legal custody and**

> **control over the fund to its rightful owner. . . . This being true, after the delivery of the check to the client, the relationship of attorney and client with respect to the fund being functus officio, he had no further right or control over it . . .** (emphasis added.)

Id. The court further recognized that "[w]here . . . the attorney does precisely what the law requires of him, and relinquishes to its true owner a fund of which the attorney was a mere custodian . . . there is not only an immediate but a final and irrevocable change in the legal custody and control of the fund." *Id.*

In addition to *Hiatt*, the Supreme Judicial Court of Maine also addressed the issuance of a check, held in trust by a law firm. *First Nat'l Bank of Boston v. New England Sales, Inc.*, 629 A. 2d 1230, (ME 1993). The case is silent on many underlying facts, but the facts as presented reveal a law firm issued a check for money held in trust for advancement of legal fees. *Id* at 1231. Subsequent to the issuance of the check, a bank served the law firm with a "trustee summons." *Id.* The court ruled "[t]he proper issuance and delivery of a check to a payee creates an implied agreement that the check will be honored when presented, and no duty arises for the trustee to stop payment on the check for the benefit of the plaintiff." *Id* at 1232. The court further opined "[t]he funds represented by the check were not subject to trustee process." *Id*.

Similarly, in the present case, once AME's trust account check was delivered to its client, AME, as a custodian of funds at the time of delivery, no

longer had control of the funds in the account which had been properly debited by the delivery of check as required by R. Regulating Fla. Bar 5-1.1 and was free from the process of garnishment.

C. The Garnishment Statute Does Not Conflict With Delivered Attorney Trust Account Checks Not Being Subject To Garnishment.

By way of background, Respondent here, FAH, the holder of a judgment against AME's client, Preclude, had the absolute right to obtain a writ of garnishment for "any tangible or intangible property of defendant [Preclude] in the garnishee's *possession or control.*" § 77.06, Fla. Stat. (2007) (emphasis added); *See also* § 77.01, Fla. Stat. (2007). This right, however, did not abrogate the duties and obligations attendant to the attorney relationship between AME and Preclude, its client. Nowhere does such proposition stand. Certainly, Florida courts have held that a "bank garnishee" has a duty to stop payment on a check by a customer that has not yet cleared even if the check has "been written and delivered to the payee prior to the service of the writ of garnishment…."It is upon this proposition that FAH relied below [5] *See Gelco Corp. v. United Nat'l Bank*, 569 So. 2d 502,

[5] FAH also contended *Hudgins v. Florida Federal Savings & Loan Ass'n*, 399 So. 2d 990 (Fla. 5th DCA 1981) supports its position. *Hudgins*, however, is not even a garnishment case. Instead, the court was confronted with the issue of whether a mortgagee could reject a mortgagor's tender of payment of equity of redemption by personal check when the parties' stipulation required cash or certified funds. The court found the personal check, even if drawn on an escrow or trust account, was insufficient to satisfy the stipulation because, unlike a

503 (Fla. 3d DCA 1990); *See also Sun Bank/N. Fla. Nat'l Ass'n v. Bisbee-Baldwin Ins. Co.*, 559 So. 2d 351 (Fla. 1st DCA 1990); *Kipnis v. Taub*, 286 So. 2d 271 (Fla. 3d DCA 1973). The relationship between a bank-garnishee and its customer is a far different set of circumstances in both effect, and import, than that of the attorney-garnishee and his or her client (or even from other non-bank garnishees).

The issue in this case really becomes one of whether the special duties and responsibilities imposed upon lawyers when dealing with the trust account funds of their clients can be analogized to a "banking relationship." Research to date has not revealed one single solitary Florida decision that imposes that a duty upon an attorney to stop payment on a trust account check after it has been delivered to a client. Rather, a lawyer has only been held to be subject to garnishment in Florida if, for instance, the settlement check is in the "physical possession" of the lawyer. *See Robert C. Malt & Co. v. Colvin*, 419 So. 2d 745, 747 (Fla. 4th DCA 1982) (attorney had physical possession of a settlement check at the time he received a writ of garnishment); *Wilkerson v. Olcott*, 212 So. 2d 119, 120 (Fla. 4th DCA 1968) (client funds placed in attorney trust account to be used to pay client's wife once divorce settlement was finalized was subject to garnishment). In the case at bar, AME did not possess the settlement check at the time AME received the writ.

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certified check, a personal check is not finally paid until the conclusion of the settlement process. This case is not analogous.

To hold that an attorney, such as AME, has a duty to stop payment on the trust account check delivered to the client would be directly contrary to the special status of an attorney's trust check created by Rule 5.1-1 as discussed above. Such a decision would also conflict with majority rule in other jurisdictions holding a non-bank garnishee has no duty to stop payment of the check upon service of a writ of garnishment. *Cent. Sec. & Alarm Co. v. Mehler*, 963 P.2d 515, 519 (N.M. Ct. App. 1998); *Frickleton v. Fulton,* 626 S.W. 2d 402, 407 (Mo. Ct. App. 1981). Prior to the decision of the Second District in this case, no Florida appellate court has issued a reported opinion expressly holding that a non-bank garnishee has a duty to stop payment of a check upon service of a writ of garnishment. Further, such a holding, as applied to the facts of this case, interferes with the Florida attorney/client relationships and conflicts with an attorney's ethical obligations to his or her client.

D. According To Majority Rule, Non-Bank Garnishees Does Not Have A Duty To Stop Payment On A Delivered Check To Its Intended Recipient.

Of further import here, the majority of jurisdictions hold that a non-bank garnishee, such as AME, which delivers a check to a judgment debtor and is then served with a writ of garnishment, has no duty to stop payment on that check to satisfy the writ. *See, Mehler*, 963 P.2d at 519 (holding that investment company garnishee had no duty to stop payment on checks the company had issued to its

client). The rationale for this rule is that the only control that a non-bank garnishee retains once the check leaves its possession is "the ultimate payment of a check through the stop payment mechanism." *Id.* Further, Article 4 of the Uniform Commercial Code, as adopted in Florida and the other states, gives the drawer of the check the right to stop payment; Article 4 does not, however, create an obligation to stop payment. §674.403, Fla. Stat. (2007). Such an obligation is created only by the express provisions of case law or the express provisions of other statutory law.

Not a single reported Florida appellate decision has been discovered that squarely addresses any duty of a non-bank garnishee to stop payment on a check once the check has been delivered to its intended recipient. *Cf. Michael Acri Boxing Promotions, Inc. v. Miles*, 758 So. 2d 704 (Fla. 4th DCA 2000) (Wherein Judge Stone in concurring opinion decries Florida's seeming failure to follow the thoughtful majority jurisdictions).

As the Second District recognized when it rendered its opinion here, section 77.06(3), Florida Statutes, may provide limited protection if the garnishee acted in "good faith." Defining "good faith," however, may be precarious, especially in light of an attorney's special relationship with the client and/or potential knowledge of the quality of the judgment that is the basis of the writ. An attorney garnishee will also need to navigate the rough seas of deciding whether this

statutory provision insulates an attorney from his or her ethical obligations mandated by the Florida Supreme Court.

Consider the fact that a non-bank garnishee which exercises the "stop payment mechanism" does not know whether the payee cashed the check at the garnishee's bank or negotiated it to another person, who may be a holder in due course. *Mehler* at 519-20. Therefore, if the non-bank garnishee, in this case a law firm, stops payment, it is entirely possible that disputes will ensue between the garnishee and the subsequent holder(s), who may be holder(s) in due course. *Id.* According to the *Mehler* court,

> [i]f we were to require stop payment orders in response to writs of garnishment, we would place an unacceptable risk of loss or double liability on the garnishee, an innocent third party with no connection to the dispute between the judgment debtor and the garnishor.

Id. Bank garnishees, on the other hand, have direct control of the funds, have immediate access to information regarding the judgment debtor's account, and are not subject to such a risk of loss of double liability. *Id.* Consequently, a non-bank garnishee's responsibility (unlike that of a bank garnishee) should end when it delivers a check to the judgment debtor. *Id.*; *See also Michael Acri Boxing Promotions, Inc. v. Miles,* 758 So. 2d at, 705 (Stone J. concurring) (citing cases following majority rule and encouraging its adoption in Florida).

Many jurisdictions have recognized the majority rule as it applies to non-bank garnishees. In Kansas, a garnishee has no duty to stop payment when it receives a writ of garnishment. *Schwerdt, Grace & Niemackl v. Speedway Festivals, Inc.*, 637 P. 2d 477, 481-83 (Kan. Ct. App. 1981). Courts in Missouri, as well as Texas, have accepted the majority rule. *Frickleton,* 626 S.W. 2d at 407; *Pearson Grain Co. v. Plains Trucking Co.*, 494 S.W. 2d 639, 641 (Tex. Civ. App. 1973).

The acceptance of the majority rule has spread to multiple jurisdictions throughout the United States. Ohio Courts decline to hold garnishees obligated to issue stop payment on a check, because "[t]o do so would place an undue burden on a garnishee who issues a check prior to being served with a notice of garnishment and who may incur additional expenses for stopping payment on the check." *Giere's Truck & Trailer, Inc v. Ward*, Not Reported in N.E. 2d (Ohio App. 3 Dist 2002). Georgia courts rely on the majority rule because of the concern the garnishee will incur liability from the holder of the check. *Watt-Harley-Holmes Hardware Co. v. Day,* 57 S.E. 1033, 1034 (Ga. App. 1907) ("…we do not think a garnishee can stop payment of a check which he has given in payment of a debt, in the absence of fraud or mistake, without incurring liability to the holder of such check."); *Togs v. Gordon*, 194 S.E. 2d 280 (Ga. App. 1972) ("Once a check has

been properly mailed and delivered to the payee, the debt represented by the check is not subject to garnishment").

Likewise, Pennsylvania courts hold, "[t]he executing and delivering of the check to the creditor was a valid assignment of the money, therefore making that amount unavailable for garnishment." *Lundy Lumber v. Deem*, 34 Pa. D. & C.3d 78, 81 (Pa.Com.Pl. 1984); *Guar. Trust & Safe Deposit Co. of Mt. Carmel v. Tye*, 196 A. 618, 620 (Pa.Super 1938) (Judgment cannot be entered against garnishee if a valid assignment of the money is made prior to service of the attachment.). Accord, *First Nat'l Bank of Boston*, 629 A. 2d at 1232 (The issuance and delivery of a check to a payee creates an implied agreement that the check will be honored when presented, no duty arises to stop payment for the benefit of the plaintiff). The courts in Illinois have also so ruled. *Hart v. O.L. Williams Veneer Co.*, 4 N.E. 2d 499, 500 (Ill. App. 1 Dist. 1936) ("…a debtor who has delivered his check for a debt to his creditor may, on being served with garnishment summons, stop payment on the check, and the payment being stopped, the debt is subject to garnishment, but the debtor is under no legal duty to stop payment on the check.").

Of import to analysis here, just as section 77.06(3), Florida Statutes, may provide limited protection if the garnishee acted in "good faith," many of the states which actually follow the majority rule also provide a similar level of protection to

a garnishee. This limited protection simply provides no basis to inflict a stop payment duty on an attorney, non-bank garnishee.

For example, in New Mexico, "[t]he garnishee is not liable for any judgment in money on account of any bonds, bills, notes, drafts, checks or other chooses in action unless they are converted into money after service of the garnishment or he fails to deliver them to the magistrate within the time prescribed by the magistrate." N.M. Stat. § 35-12-3 (2007). In Georgia, "[a] garnishee and a plaintiff shall not be subject to liability to any party or nonparty to the garnishment at issue arising from the attachment of a lien, the freezing, payment, or delivery into court of property, money, or effects reasonably believed to be that of the defendant if such attachment, freezing, payment, or delivery is reasonably required by good faith effort to comply with the summons of garnishment." Ga. Code § 18-4-92.1 (2007). Missouri and Pennsylvania continue to follow this application and protect a garnishee from liability. *See* Mo. Ann. Stat. § 525.040 (Vernon 2007) and Pa. R. Civil P. No. 3143 (2007).

In contrast with the majority, the Second District appears to be of the opinion that, since section 77.06(3) Florida Statutes, provides protection to non-bank garnishees from liability to an innocent third party, its decision was necessary. *First American Holdings Inc.* at 1234. However as described above, many majority rule jurisdictions obviously do not find this "protection" persuasive

on the issue of whether the non-bank garnishee shall be required to issue a stop-payment order. These majority jurisdictions provide, as Florida should, two-fold protection to a non-bank garnishee. First, they find that a non-bank garnishee has no duty to stop payment on an issued check when it receives a writ of garnishment. *See, e.g., Mehler* at 519; *Watt-Harley-Holmes Hardware Co.* at 1034; *Togs* at 280; *Frickleton* at 407; *Lundy Lumber* at 81; *Tye* at 620. Second, these jurisdictions provide a garnishee with statutory protection from a third party claim when the garnishee acts with diligence and/or good faith. Section 35-12-3, New Mexico Statutes 1978 (2007); Section 18-4-92.1, Georgia Code (2007); § 525.040, Missouri Statutes (2007); Pennsylvania Rule of Civil Procedure 3143, Pennsylvania Statutes (2007). The above jurisdictions show that these two rules of law can co-exist in harmony; providing protection to a non-bank garnishee without undermining garnishment law.

The Second District's decision in this case, which does not adopt the majority approach in non-bank garnishee cases, actually may undermine existing Florida law. Under current Florida uniform commercial code ("UCC") law, once a check is taken to satisfy an underlying obligation, the obligation of the payor is suspended until the check is dishonored or paid (in which event the obligation is discharged). *See* § 673.3101(2) Fla. Stat. (2007). Accordingly, if a non-bank garnishee must stop payment on a check it has delivered to its payee, it will create

a rule that is inconsistent with Florida UCC law. The non-bank garnishee will have the obligation to stop payment on a "suspended obligation," creating an undesirable and unnecessary dichotomy. *See Schwerdt, Grace & Niemackl*, 637 P.2d at 482 (recognizing that majority rule is consistent with UCC provision); *Barlow v. Lane*, 745 S.W.2d 451, 453 (Tex. App. 1988) (same).

In sum, Florida courts should follow the majority approach and hold that "upon service of a writ of garnishment, a non-bank garnishee does not have a duty to stop payment on checks that have been issued and delivered to discharge a debt." *See Michael Acri Boxing Promotions, Inc.*, 758 So. 2d at 705. (Stone, J., concurring opinion) (encouraging Florida courts to adopt the majority rule).[6] The adoption of the majority rule would still require non-bank garnishees to satisfy the writ from property in their actual possession or control. Adoption of the majority rule would just preclude garnishments of an incorporeal "suspended obligation" or disturbance of important fiduciary relationships. This, by refusing to impose a duty to stop payment on <u>delivered</u> checks. Clearly, it will have no impact on established Florida bank-garnishee law.

[6] The *Michael Acri Boxing Promotions, Inc.* decision was a per curiam affirmance with citations to bank garnishee cases. However, based on Judge Stone's concurring opinion, the case apparently dealt with a non-bank garnishee. Regardless, it is impossible to ascertain the underlying facts or rationale that led to the court's decision.

E. Under Statutory Construction Rules, The Garnishment Statute Does Not Conflict With Delivered Attorney Trust Account Checks Not Being Subject To Garnishment.

When a statute is clear and unambiguous, the courts will not look beyond the statute's plain language and apply rules of statutory construction. *Wood v. Fla. Rock Industries & Crawford*, 929 So. 2d 542, (Fla.1st DCA 2006). The legislative intent is the court's polestar when applying statutory construction analysis. *McLean v. State*, 934 So. 2d 1248, (Fla. 2006). Courts should first look to the statute's plain language. *Id*. at 1259. "[W]here possible, courts must give full effect to all statutory provisions in harmony with one another." *Montgomery v. State*, 897 So. 2d 1282, (Fla. 2005). Additionally, courts should consider administrative usage prior and subsequent to the act. *P.A.C. v. State*, 391 So. 2d 364, (Fla. 1st DCA 1980). "Abstract speculation" should not be resorted to without first looking at the administrative usage. *Id*. at 365.

Florida courts have continuously recognized that under rules of statutory construction, the legislature "… is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted." *Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975); *Ford v. Wainwright*, 451 So. 2d 471, 475 (Fla. 1984) ("It is an accepted rule of statutory construction that the legislature is presumed to be acquainted with judicial decisions on the subject

concerning which it subsequently enacts a statute."); *City of Ormond Beach v. City of Daytona*, 794 So. 2d 660, 664 (Fla. 4th DCA 2001) ("…the Legislature is presumed to know, and to have adopted, existing judicial constructions at the time it enacts legislation, unless a contrary intent is expressed in the statute."). *Accord Adler-Built Industries, Inc. v. Metropolitan Dade County*, 231 So. 2d 197, 199 (Fla. 1970) ("The Legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute."). Moreover, in *Wood v. Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996) (which concerned the legislature's continued reenactment of statutory provisions) the court stated in "…Florida's well-settled rule of statutory construction that the legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute.'" (citing *Collins Inv. Co. v. Metropolitan Dade County*, 164 So. 2d 806, 809 (Fla. 1964)).

Current Florida case law states that neither a bank nor a purchaser of a cashier's check has the authority to issue a stop payment order on a cashier's check. *Behavioral Health and Wellness, Inc.* at 376 (bank had no right to stop payment of cashier's check); *Crosby* at 1156 (The purchaser of a cashier's check did not have any right to order a bank to stop payment when the cashier's check is presented.) "The purpose of a cashier's check is to act as a cash substitute in dealings between parties. Parties using cashier's checks in place of ordinary

checks or instruments do so because cashier's checks do not carry the risk of litigation costs or insolvency…." *Warren Finance, Inc.* at 194. *Warren* further opines "[b]ecause the bank, and not the drawer, is personally liable, the holder of a cashier's check knows that upon presentment the issuing bank will honor its obligation." *Id.* at 196.

The Florida legislature has made amendments to and reenacted sections 77.01, 77.04, and 77.06, Florida Statutes multiple times since these 1988 and 1989 judicial decisions (§77.01 amended in 2001 and 2000; §77.04 amended in 2005 and 1995; §77.06 amended in 2000 and 1995). §77.01, Fla. Stat. (2007); §77.04, Fla. Stat. (2007); §77.06, Fla. Stat. (2007). Accordingly, under the rules of statutory construction, the legislature was aware of the judicial decisions holding neither a bank, nor a purchaser of a cashier's check, has a right to order a stop payment on an issued cashier's check. *Crosby* at 1156. Under this presumption, it is reasonable to assume Florida Garnishment Law, including sections 77.01, 77.04, and 77.06, does not apply to a cashier's check drawn on an account and delivered to the payee prior to the receipt of a writ of garnishment, if the writ occurs prior to the presentment of that check for payment to the bank.

In the present case, the Second District Court stated "…the issue we must resolve is whether funds held in the attorney's trust account are still considered to be in the 'possession or control' (citing §77.04, Fla. Stat.) of the attorney at the

time the attorney receives the writ of garnishment if the attorney has previously drawn a check on those funds and has personally delivered it to his client but the client has not yet presented the check for payment." *Preclude* at 1233. The Second District opined that "possession and control" are unclear and ambiguous terms in section 77.04 as to delivered attorney trust account checks. We submit that proper interpretation of the phrase "possession and control" in the context of this case, requires review of the Rules Regulating The Florida Bar, specifically, the rules regulating trust accounts. These rules should be considered as examples of the administrative usage (of which the legislature is presumed to be aware) prior and subsequent to the enactment of the Florida Garnishment Law.

Of import here, the Rules Regulating The Florida Bar view a delivered attorney trust account check in a similar light as a delivered cashier's check:

First, the rules require a lawyer to "hold in trust . . . funds and property of clients . . . that are in a lawyer's possession in connection with a representation." R. Regulating Fla. Bar 5-1.1(a)(1).

Second, money that is "entrusted to an attorney for a specific purpose . . . is held in trust and must be applied only to that purpose . . . ." R. Regulating Fla. Bar. 5-1.1(b). Thus, under the Rules, although an attorney temporarily "possesses" the client's funds, a client clearly retains "control" over trust funds at all times. The client's right to control, and ultimately possess funds owed to them, imposes a

mandatory duty upon lawyers to promptly distribute to the client any portion of money received from a third party that is not subject to dispute over counsel's fees. R. Regulating Fla. Bar R. 5-1.1; *In re Amendment to the Rules Regulating the Florida Bar,* 875 So. 2d 488, 534-35 (Fla. 2004).

Third, upon prompt distribution to the client of the attorney's trust check payable to the client's order:

> [a]n attorney must assume that the recipients of checks drawn upon his trust account will present such checks for payment immediately at the drawee bank. *In re Amendment to the Integration Rule,* 467 So. 2d at 704 n.* (emphasis added).

Therefore, an attorney must immediately debit the client's account for the amount of the check delivered to the payee and deem the money in the account paid to the payee and no longer subject the attorney's control. Once the check is delivered, the subsequent events with respect to the check, such as whether the check has been in fact presented or perhaps endorsed by the payee to a third party, are not within the control of the attorney, absent a requirement imposed by law to exercise some control over the disposition of the check before actual payment.

Finally, lawyers are permitted to accept attorney's trust account checks and other highly reliable deposits as noted in Rule Regulating Florida Bar 5-1.1(i), before the funds are finally settled and credited to the lawyer's trust account, if "the lawyer has a reasonable and prudent belief that the deposit will clear and

constitute collected funds in the lawyer's trust account within a reasonable period of time". *In re to the Amendment to the Integration Rule* at 704-05; R. Regulating Fla. Bar 5-1.1(i). This is an exception to the general principle that trust account funds cannot be disbursed unless the funds are deposited, finally settled, and credited to the lawyer's trust account. *See* R. Regulating Fla. Bar 5-1.1(i). Without this permissible exception, lawyers could potentially use the funds of other clients for an unauthorized purpose, *i.e.* the disbursement of their funds to other clients. *In re Amendment to the Integration Rule,* 467 So. 2d at 705.

These ethical obligations and the cited Rules have clearly given attorney's trust fund checks a special status and a degree of certainty under the law, similar to certified checks or cashier's checks. In essence, because the Rules require the attorney (1) to treat the trust account check which he or she has issued as a paid instrument, debited against the account immediately upon delivery and (2) to issue such a check only against collected funds in the account, unless the attorney has a reasonable and prudent belief that the funds will clear and constitute collect funds, the attorney's trust check has a special status in the community. Given this special status, and the obligations attorneys owe to their clients to hold their funds in "trust," immediately disburse funds, and anticipate immediate presentment at the bank, it would be illogical and contrary to Florida ethics principles to require a lawyer to stop payment on a trust account check once it has been delivered to the

client to satisfy a writ of garnishment. In effect and application in the community, a Florida attorney's responsibility for his or her trust account check is virtually equivalent to the bank's responsibility on a cashier's check.

Additionally, these Rules and the Florida Bar's supervision of attorneys and their trust accounts, further evidences the importance of attorney trust account checks and cashier's checks. Therefore, it should not be an attorney's duty to issue a stop payment order for a check drawn on his or her trust account and delivered to the payee prior to the receipt of a writ of garnishment if the writ is served prior to the presentment of that check for payment to the attorney's bank.

F. Under Florida Constitution, Florida Supreme Court Has Exclusive Jurisdiction To Regulate Attorney Trust Accounts.

The Florida Constitution created three separate branches of government: Judicial, Legislative, and Executive. Art. II, §3, Fla. Const. Further, the Florida Constitution states "no person belonging to one branch shall exercise any powers appertaining to either of the other branches…" *Id*. As articulated in the Florida Constitution, "the Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const. The Florida Courts have long-recognized this exclusive jurisdiction. *The Florida Bar v. Massfeller*, 170 So. 2d 834, (Fla. 1964) (Supreme Court has exclusive jurisdiction over the admission and discipline of attorneys. Interference in the discipline of attorneys by the legislative or executive branch is

prohibited.); *In re Fla. Bd. of Bar Examiners*, 353 So. 2d 98, (Fla. 1977) (Constitution prohibits legislative interference with the Court's exercise of its power to govern admissions to The Florida Bar.).

The Florida Supreme Court adopted the Rules Regulating The Florida Bar for application to attorneys and the practice of law. The attorney trust account rules provide definitions, guidelines, and procedures for the maintenance of an attorney trust account. R. Regulating Fla. Bar 5-1. Currently, under Rule 5-1.1(j), an attorney can disburse funds from his or her trust account in reliance on a deposit "(1) when the deposit is made by certified check or cashier's check;… (3) when the deposit is made by a check drawn on the trust account of a lawyer licensed to practice in the state of Florida …when the lawyer has a reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable time." This rule treats checks drawn on attorney trust accounts similarly to cashiers checks. R. Regulating Fla. Bar 5-1.1(j). Florida law provides that neither a bank, nor a purchaser of a cashier's check, has a right to stop payment on a cashier's check. *Behavioral Health and Wellness, Inc.* at 376. Similarly, the attorney and his law firm should not have a duty to stop payment on a trust account check delivered to a client.

The Second District's interpretation of section 77.04, Florida Statutes, envisions the legislature requires attorneys to issue a stop payment order on his or

her trust account check already delivered to the payee prior to the receipt of a writ of garnishment -- if the writ is served prior to the presentment of that check for payment to the attorney's bank. This interpretation has a direct effect on the Rules Regulating The Florida Bar, specifically rule 5-1. An attorney can no longer rely on a delivered trust account check from another attorney because the funds can be garnished. Consequently, an attorney can not disburse funds from his or her trust account in reliance on a deposit made from a check drawn on the trust account of another lawyer until confirmation that they are "collected funds," which conflicts with the ethical rule. This interpretation will also require further management and accounting procedures for attorney trust accounts, which are not currently enumerated in the Rules Regulating The Florida Bar.

Put simply, the Second District's ruling on section 77.04, Florida Statutes violates the Florida Constitution's separation of the powers of the three branches of government by allowing the Florida Legislature to directly regulate attorneys and their management of trust accounts. This "change" in the Rules Regulating The Florida Bar is a usurpation of power from the judicial branch by the legislative branch.

CONCLUSION

Delivered attorney trust account checks should not be subject to garnishment. Attorneys and, more importantly, clients and the public, rely on

attorney trust account checks for transacting business. This "trusted" account, which is closely scrutinized and widely respected, must be a safe and sound source of funds. The requirement to stop payment on such a check will undermine the publics' confidence. This issue maintains its inherent importance, despite the fact that attorney trust accounts may seldom be garnished. Even if a stop payment order is issued on a trust account check delivered to one client, on one transaction, it is once too often. If the Second District's decision stands, this Court must, respectfully, consider rewriting the rules concerning attorney trust accounts, including removing Category 4 from Rule 5-1.1(j) pertaining to the "trustworthiness" of the attorney trust account check. Additionally, it will be necessary for The Florida Bar to immediately begin an education program for all attorneys and warn them of this impending trap.

The Second District's decision, which changes the "rules" for any real estate, business, or other transaction, in which the attorney trust account checks are used to disburse the closing or settlement funds, should be overruled. Respectfully, this Court should reverse the decision below and establish the rule that an attorney garnishee is not obligated to issue a stop payment order on a trust account check delivered before the attorney receives a write of garnishment.

Respectfully submitted,

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I certify that a copy hereof has been furnished via United States mail to the following on August 8th, 2007:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Times New Roman 14-point font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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