IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: SC10-1754
L.T. Case Nos.: 4D10-203
2008DR011685MB

ROBIN ROSHKIND,

Petitioner,

vs.

BELINDA CHARLENE MACHIELA,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT

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INTRODUCTORY STATEMENT

The parties to this appeal shall be referred to herein in the same manner as in Petitioner's Initial Brief. Respondent has attached an Appendix to this Answer Brief, and references to the Appendix shall be cited as (App. ___) followed by the Appendix number of the document.

STATEMENT OF THE CASE AND FACTS

Petitioner represented Machiella in a divorce proceeding in the Circuit Court of Palm Beach County, Florida. Petitioner and Machiela entered into a written Retainer Agreement on August 20, 2008 (App. 1). The Retainer Agreement contains the following relevant provisions:

(1) The "final fee" for the representation will be determined by the attorney based on the criteria set forth in D.R. 2-106(B) of the code of Professional Responsibility primarily as follows: amount of work involved, difficulty of the case, skill required, reputation and expertise of counsel and time limitations imposed by the client or circumstances. (App. 1, pp. 1).

(2) The client is responsible for an "initial fee" of $4,000.00, and any "additional fee" is to be based on the factors set forth above. (App. 1, pp. 1-2).

(3) Despite the reference to former Rule 2-106(b) of the Code of Professional Responsibility, the contract goes on to provide that Robin Roshkind will charge $350.00 per hour, and "Associate Counsel" or "Substitute Counsel" will charge $350.00 per hour for legal services. Associate Counsel and Substitute Counsel are not defined in the Retainer Agreement. (App. 1, pp. 2).

(4) All time billed is rounded up to the nearest tenth of an hour; therefore a telephone call that actually takes ten minutes will be billed at twelve minutes. (App. 1, pp. 2).

(5) If at any time the client believes a bill contains errors or is not reasonable, the client must notify the firm in writing of the objection within thirty days of the date of the bill. Failure to notify the firm of an objection means the client agrees that the billing is correct, accurate and reasonable. (App. 1, pp. 2).

(6) The Agreement provides that the client agrees to arbitrate all billing disputes, and waives a trial by jury as to all billing disputes. (App. 1, pp. 2).

(7) Rather than charge for costs actually incurred, the firm adds a 10% "cost charge" to each bill to account for things such as photocopies, postage, toll calls and facsimiles (received and sent). No further accounting of actual costs is required under the contract. (App. 1, pp. 2).

(8) The firm retains the absolute right to modify its billing rates upon written notice to the client. (App. 1, pp. 3).

(9) The Agreement provides that the client must maintain a $3,000.00 credit balance with the firm, essentially requiring the pre-payment of legal fees. Moreover, in the event that the case is set for trial, the Agreement requires the client to pre-pay attorney's fees and anticipated costs for the anticipated

length of the trial at least forty-five days prior to trial. The Agreement provides that the firm can refuse to set a hearing on settled cases until all old balances are paid, as well as anticipated fees for the settlement hearing are paid in advance. (App. 1, pp. 3).

(10) The Agreement provides that upon execution, the client irrevocably and without the need of any additional hearing, conveys a lien for all monies due to the firm on any award arising from the case, as well as a lien on all real property (in any state in the United States), including homestead property, and all tangible and intangible personal property, including all retirement plans and accounts owned by the client. (App. 1, pp. 3-4).

(11) The Agreement provides that any balances due for attorney's fees shall not be dischargeable in bankruptcy. (App. 1, pp. 5).

(12) The firm is permitted to withdraw at any time if the client, among other things, "refuses to follow the attorney's advice." (App. 1, pp. 7).

(13) Under the Agreement, if the client fails to make any of the myriad of payments required by the Agreement, the firm may withdraw from the representation. Specifically, the Agreement provides,

> IN THE EVENT THE FIRM HAS TO FILE A MOTION TO WITHDRAW OR A MOTION TO ADJUDICATE ATTORNEY'S CHARGING LIEN AND FOR A MONEY JUDGMENT, MY SIGNATURE BELOW ACTS AS MY CONSENT TO THE MOTION TO WITHDRAW AND/OR MOTION TO ADJUDICATE

ATTORNEY'S CHARGING LIEN AND FOR A MONEY JUDGMENT.

(App. 1, pp. 7-8)(emphasis in original). Although the Retainer Agreement provides that the client "has had an opportunity to seek independent legal advice and counsel in regards to" the provision of the contract in which the client waived her right to trial by jury, there is no record evidence indicating whether the client actually obtained separate legal advice regarding the Retainer Agreement.

In April of 2009, after only six months of litigation, Petitioner filed a Notice of Charging lien on Machiela's equitable interest in certain real property for attorney's fees. (App. 2). However, Petitioner did not move to withdraw at that time, and the record does not disclose whether monies were owed.

Finally, on July 24, 2009, Petitioner moved to withdraw as counsel, which motion was granted on October 21, 2009. (App. 4). Petitioner filed its Corrected Motion for Entry of Final Judgment Adjudicating Charging Lien and for Entry of a Money Judgment on October 27, 2009. (App. 3. This Motion was heard by the trial court on December 21, 2009. (App. 5). The trial court noted that, at the time of the hearing, no final judgment had been entered, and therefore, there was no *res* to which any lien could attach. (App. 5). Nonetheless, Petitioner sought a summary determination of the amount of fees and costs due to it by the trial court. (App. 5). Petitioner presented the testimony of the attorney primarily responsible for the representation, but presented no expert testimony supporting its claim for

attorney's fees. (App. 5 and 6). Machiela appeared at the hearing alone, without an attorney. Petitioner appeared at the hearing and was also represented by separate counsel at the hearing. Although the record indicates that Machiela testified in opposition to the attorney's fee claim, the record is silent as to the precise nature of the dispute and why she disagreed with the amount of the attorney's fees. (App. 5).

The trial court denied Petitioner's Corrected Motion for Entry of Final Judgment Adjudicating Attorney's Charging Lien and for Entry of a Money Judgment based on Petitioner's failure to provide expert testimony.

After an unsuccessful Motion for Rehearing, Petitioner appealed the trial court's denial to the Fourth District Court of Appeals. On appeal, and in accordance with nearly half a century of precedent, the Fourth District rejected Petitioner's argument and affirmed the trial court. However, the Fourth District Court of Appeals certified the following question to this Court:

> **Is expert witness testimony necessary to establish attorney's fees due under a charging lien against a client who has entered into a retainer agreement that requires all fee disputes to be made in writing within thirty days of the bill's receipt and has failed to object?**

(App. 6). This appeal followed.

SUMMARY OF THE ARGUMENT

Florida attorneys are officers of the court and the closest of fiduciaries to their clients. As such, it has been long recognized that courts have a legitimate and important interest in closely monitoring and scrutinizing attorneys' interactions with their clients. Attorneys' billing practices are no different, and when an attorney seeks court approval of his fee, the court should take great care to ensure the fairness of the transaction. The long-standing rule requiring expert testimony to support an attorney's fee award is one important tool in allowing courts to scrutinize attorneys' fees and protect individual litigants, as well as ensure continued confidence in the judicial system. The very limited benefits of eliminating this requirement are outweighed by the rule's importance in protecting litigants when they are at their most vulnerable.

The Contract Rule applied to the Retainer Agreement in this case is particularly in need of expert testimony to support an attorney's fee award. Retainer Agreements such as the one at issue here, where there is no set hourly rate or specific fee based on a contingency, are particularly susceptible to abuse. In determining whether the fee is "clearly excessive" in accordance with Rule 4-1.5(a) and (b) of the Rules Regulating the Florida Bar, trial courts should have the benefit and clients should have the protection of expert testimony to assist the trial court in making its determination.

STANDARD OF REVIEW

Where the District Court of Appeal certifies a question to the Florida Supreme Court, the Court is privileged to review the entire decision of the District Court of Appeal. Confederation of Canada Life Ins. Co. v. Arminan, 144 So. 2d 805, 807 (Fla. 1962). Machiela agrees that the standard of review, therefore, is de novo. However, the Court's review should focus on whether the decision and opinion of the District Court was correct, and this Court should not consider matters not before the District Court. Id. See also Giblin v. City of Coral Gables, 149 So. 2d 561, 561-62 (Fla. 1963).

ARGUMENT I

The Long-standing Rule Requiring Expert Testimony to Support Attorney's Fee Awards Should be Upheld by this Court.

Justice Cardozo penned one of the most often cited descriptions of how the law views a fiduciary relationship:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion of particular exceptions." Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Meinhard v. Salmon, 164 N.E. 545, 546 (NY Ct. App. 1928)(citation omitted). The relationship between a client and his attorney is precisely the type of relationship Justice Cardozo described above. In fact, this Court has stated that "there is *no* relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client." Gerlach v. Donnelly, 98 So. 2d 493, 498 (Fla. 1957)(emphasis added). Consequently, attorneys' business dealings with clients are subject to the closest scrutiny by the courts, and the burden is on the attorney to establish by clear and convincing evidence the fairness

"of an agreement or transaction purporting to convey a property right from a client to his attorney." Id.

In addition to holding a fiduciary position with their clients, as "officers of the court" attorneys hold a special place of trust in society. According to this Court, "[l]awyers have been granted a special boon by the State of Florida – they in effect have a monopoly on the public justice system." In re Amendments to the Rules Regulating the Florida Bar, 598 So. 2d 41, 43 (Fla. 1992). As such, courts have "'an especially great' interest in regulating lawyers, since 'lawyers are essential to the primary governmental function of administering justice.'" Schwartz v. Kogan, 132 F.3d 1387, 1391 (11th Cir. 1998)(quoting Kirkpatrick v. Shaw, 70 F.3d 100, 103 (11th Cir. 1995).

Close scrutiny of attorneys' interactions with their clients is particularly important in dissolution of marriage cases like the one before the Court. Certainly, very few legal proceedings are as personal and contentious as the dissolution of a marriage. Few clients seeking legal advice are in a more vulnerable position than the client seeking a divorce. In this case, the attorney for Ms. Machiela, on the eve of filing a petition to dissolve her marriage, had her sign a fee contract containing extremely onerous terms, including the waiver of her right to a trial by jury and a waiver of her right to object to her attorneys withdrawing from the representation. In addition, although the contract contained a reference to hourly rates, the fee to

be charged was uncertain, and to be determined by the law firm in accordance with only some of the criteria set forth in the Rules Regulating the Florida Bar. Finally, the Retainer Agreement gave the law firm a perpetual lien on the subject matter of the lawsuit and all personal and real property, including homestead, owned by Ms. Machiela. Under these circumstances, the highest level of scrutiny should be applied to the activities of the firm, and the ultimate attorney's fee it deemed to charge.

Petitioner claims that the long-standing rule of requiring expert testimony to support an award of attorney's fees had its genesis with the Second District in Lyle v. Lyle, 167 So. 2d 256 (Fla. 2d DCA 1964). While this case certainly provided the basis for the modern rule, the use of expert testimony to support attorney's fee awards predates the Lyle case by many years. In Baruch v. Giblin, 164 So. 831, 833 (Fla. 1935), this Court held that, while the practitioner is competent to testify as to the value of his services, separate expert testimony "may be offered in support of the issue as to the value of the services . . . ." This Court went on to state:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a

> species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation.

Id.

The long-standing rule of requiring expert testimony to support an attorney's fee award is one way of protecting against abuses by attorneys, and ensuring continued confidence of the public in the judicial system. The Second District Court of Appeal correctly held that the self-serving testimony of the attorney responsible for the representation is insufficient to satisfy the special scrutiny applied to attorneys who ask the courts to approve their fees. Lyle, 167 So. 2d at 257. Instead, the responsible attorney's testimony must be supported by competent expert testimony supporting the value of the services rendered. Id.

Just four years after Lyle, this Court addressed a similar issue in Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454 (Fla. 1968). In that case, the parties wished to use a stipulation to allow the trial court in worker's compensation proceedings to determine, in its own discretion, and without the benefit of any evidence from the parties, the amount of attorney's fees to award the claimant. Id. at 456. Even the Florida Industrial Commission supported this procedure based on the need for expediency in the face of overwhelming case-loads. Id. at 457. However, this Court declined to take that step in the name of

efficiency. Instead, the Court held that a trial court may not award fees based solely on its discretion and personal experience. Rather, the trial court must have "some evidence in the record to reflect the reasonable value of the services rendered, as well as the customary charge for such services in the community where they were rendered." Id. at 458.

The rule requiring expert testimony in support of attorney's fees has been followed in Florida since, at least, the Lyle decision in 1966. See Sourcetrack, LLC v. Ariba, Inc., 34 So. 3d 766 (Fla. 2d DCA 2010); Island Hoppers, Ltd. v. Keith, 820 So. 2d 967 (Fla. 4th DCA 2002)(holding that expert testimony is necessary to support attorney fee claim against third party); Sea World of Florida, Inc. v. Ace American Ins. Companies, Inc., 28 So. 3d 158 (Fla. 5th DCA 2010)(holding that expert testimony is required for fee claims against third parties); Universal Beverages Holdings, Inc. v. Merkin, 902 So. 2d 288 (Fla. 3d DCA 2005)(holding that evidence, including expert testimony, was sufficient to support attorney's fee claim against client even without detailed billing records). Before overturning precedent, this Court traditionally asks whether (1) the prior rule proved unworkable due to reliance on an impractical legal fiction; (2) the rule can be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law; and (3) the factual premises on which the rule is based have changed so drastically, that the rule is utterly without legal

justification. See North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612, 637-638 (Fla. 2003).[1]

Opponents of the rule argue that the rule should be abolished because it has become unworkable due to additional delay and expense associated with expert testimony. See Island Hoppers, Ltd. v. Keith, 820 So. 2d 967, 976-977 (Fla. 4th DCA 2002)(J. Gross dissenting). See also Robert J. Hauser, Raymond E. Kramer III, & Patricia A. Leonard, Is Expert Testimony Really Needed in Attorney's Fees Litigation?, Fla. B.J., Jan. 2003. However, as the authors of the above article point out, very little of the expense and delay involved in attorney's fee litigation is directly related to expert testimony. In fact, as this Court noted in Travieso v. Travieso, 474 So. 2d 1184, 1186 (Fla. 1985) traditionally, attorneys will testify gratuitously for other attorneys on the issue of reasonable fees. In those cases where extraordinary effort is required, the costs associated with hiring the expert witness will be borne by the non-prevailing party. Id. There is no evidence in this record to suggest that abolishing the need for expert testimony will (1) significantly reduce the hearing time necessary to make the fee determination, (2) reduce the wait time for hearing dates, or (3) eliminate discovery disputes; especially related to discovery of the attorney's files and billing records.

[1] Appellant is aware that the Florida Supreme Court has yet to issue a ruling on the necessity of expert testimony to support attorney's fee claims. However, since all parties agree that it is the established rule that such testimony is required, this Court should give the rule the same weight it gives other precedent.

Abolishing the rule will simply reduce the number of witnesses by one, perhaps two, and will limit the evidence available to the trial court to the self serving testimony of the attorneys responsible for the representation.

Opponents of the rule also challenge its legal justification. In his dissent, Judge Gross opined that the rule "rests on shaky theoretical grounds," and the rule's rationale ignores the "basic precept of our adversary system that the credibility of testimony is best resolved by the finder of fact." Island Hoppers, 820 So. 2d at 976. Others argue that attorney's fee retainer agreements are contracts, no different than any other, therefore obviating the necessity of expert witness testimony regarding the value of the services. See Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982)(argument rejected by this Court). However, these arguments ignore the fact that the practice of law is different from other professions and subject to stricter scrutiny by the courts in a number of ways.

Heightened scrutiny is applied to attorney-client fee contracts. Courts are authorized to enforce the Rules Regulating the Florida Bar, and Rule 4-1.5(a) specifically prohibits an attorney from charging an illegal, prohibited or clearly excessive fee or cost. Rule 4-1.5, Fla. R. Reg. Fla. Bar. In that regard, this Court has held that although fees will vary from case to case, "all of the time a lawyer spends on a case is not necessarily the amount of time for which he can properly charge his client . . . . [rather] it's the time that reasonably should be devoted to

accomplish a particular task." The Florida Bar v. Richardson, 574 So. 2d 60, 63 (Fla. 1990). Therefore, simply because an attorney and his client entered into a contract for specified rate (as is the case here), the attorney is not necessarily justified in charging the contract rate for every minute he spends on the file. Similarly, contracts that contain unreasonable time-periods within which a client may object to billing statements are unconscionable and unenforceable. See Elser v. Law Offices of James M. Russ, P.A., 679 So. 2d 309, 313 (Fla. 5th DCA 1996). Finally, special scrutiny is also applied to contracts containing arbitration provisions. See Arabia v. Siedlecki, 789 So. 2d 380, 383 (Fla. 4th DCA 2001)(holding that "[a]n attorney must be clear and precise in explaining the terms of a fee agreement. To the extent the contract is unclear, the agreement should be construed against the attorney.").

Like the fee agreements between attorney and client, the relationship between attorney and client is also subject to stricter scrutiny than other professional relationships. Rule 4-1.8(c) of the Rules Regulating the Florida Bar restricts a lawyer in soliciting gifts from clients and preparing instruments in which a client gives a gift to the lawyer. In fact, the law "takes a specially skeptical view" of gifts from client to attorney, and imposes a heightened burden on the attorney to prove by clear and convincing evidence the fairness of the gift. Crane v. Stulz, 136 So. 2d 238, 241 (Fla. 2d DCA 1961). Courts also take a dim view of

intimate relationships between attorney and client, scrutinizing the relationship beyond any criminal code to ensure fairness to the client and to ensure that the practice of law maintains its lofty goal of being a social tool for justice. See The Florida Bar v. Senton, 882 So. 2d 997, 1003 (Fla. 2004)(holding that even though coerced sex may not have arisen to level of criminal act, it justified disbarment). See also The Florida Bar v. Bryant, 813 So. 2d 38 (Fla. 2002)(imposing a one year suspension on an attorney who agreed to his client's suggestion to trade legal representation for sexual favors, among other violations).

The law also more closely scrutinizes lawyer advertising than other professionals. The Supreme Court has held that the state has the ability to regulate lawyer advertising both as a general interest to protect consumers (as is true with any profession) as well as "a special responsibility to regulate lawyers." Mason v. The Florida Bar, 208 F.3d 952, 956 (11th Cir. 2000)(citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). The Bar is even permitted to prohibit in-person solicitation by attorneys, a measure taken with no other profession, because it is viewed as "inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential harm to the prospective client." Ohralik, 436 U.S. 454.

Florida attorneys, unlike any other profession, are required to annually report their pro bono services and their charitable giving to legal aid type

organizations. Rule 4-6.1 of the Rules Regulating the Florida Bar specifically provides that licensed attorneys "should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor." This Court justified its retention of the pro bono reporting requirement by observing that "[l]awyers have been granted a special boon by the State of Florida – they in effect have a monopoly on the public justice system. In return, lawyers are ethically bound to help the State's poor gain access to that system." In re Amendments to Rules Regulating the Florida Bar, 598 So. 2d 41, 43 (Fla. 1992). In upholding the constitutionality of the pro bono reporting requirement, the Eleventh Circuit held that the Florida Supreme Court has a legitimate interest in encouraging attorneys it licenses to provide pro bono legal services, because "lawyers are essential to the primary government function of administering justice" and "the free provision of legal services to the poor has long been recognized as an essential component of the practice of law." Schwartz v. Kogan, 132 F.3d 1387, 1391 (11th Cir. 1998).

Rule 4-3.7 of the Rules Regulating the Florida Bar also supports the requirement of expert testimony to support attorney's fee claims. Under that rule, an attorney acting as an advocate in litigation generally may not testify as a witness. The purpose of the rule is to "prevent the evils that arise when a lawyer dons the hats of both advocate and witness." Scott v. State, 717 So. 2d 908, 910

(Fla. 1998). An exception to the general rule, allows a lawyer to testify where "the testimony relates to the nature and value of legal services." Rule 4-3.7(a)(3). According to the comments to the rule, the exception is intended to avoid the necessity of obtaining separate counsel for the attorney's fee phase of a case. However, nothing in the exception indicates an intention to alleviate the need for expert testimony. Moreover, the fact that the Rules recognize the problematic proposition of having the advocate also be a material witness, supports the need for expert testimony to buttress the advocate's testimony.

Lawyers generally are held to a higher standard under the law than other professionals. Arguably, there is no other context under which an attorney should be held to a higher standard than when he is billing his client and seeking court approval of those fees. For this reason, courts are justified in requiring a higher standard and volume of proof regarding attorneys fees than the courts require from other professionals. Without expert testimony, the decision is based solely on the testimony of the interested attorney and the experience of the judge. In many instances, such as the case here, the client may not even be represented by counsel. In many foreclosure proceedings, the adverse party may never make an appearance. Without the input of an expert witness, the public can get the impression that the attorney for the creditor is making the ultimate decisions, rather than the court.

Expert testimony demonstrates, at the very least, that another set of eyes have reviewed the attorney's fee request providing an additional layer of protection against overreaching and abuse of the confidential relationship between attorney and client. The requirement also protects the attorney seeking the fees from claims that he is overreaching (assuming the expert asked to pass judgment on the fees agrees they are reasonable). If the expert asked to review the fees finds them to be unreasonable, the responsible attorney has the opportunity to avoid a violation of the Bar Rules by voluntarily reducing his fees.

The fact that some attorneys' testimony regarding others' fees amounts to a "rubber stamp," as suggested by Petitioner, is not justification for abandoning the rule. Those attorneys that "rubber stamp" their friends' attorney's fees, by affidavit or live testimony, are subject to the same sanctions as other attorneys that fail to abide by the Rules Regulating the Florida Bar. Truly, if judges are able to determine a reasonable fee after six months on the bench (as suggested by Judge Gross), these same judges can eliminate from consideration the opinions of those attorneys that fail to take their role as experts seriously.

It is acknowledged that attorney's fee disputes are time-consuming and fraught with problems for both litigants and attorneys. However, abrogating the requirement of expert testimony is not the most expedient way to deal with these problems. As the authors of the above referenced Bar Journal article point out,

there are several other ways in which to streamline the attorney's fee dispute process, and reduce both headache and expense. Robert J. Hauser, Raymond E. Kramer III, & Patricia A. Leonard, Is Expert Testimony Really Needed in Attorney's Fees Litigation?, Fla. B.J., Jan. 2003. Automatic discovery and disclosures, similar to Federal Rule 26 or Rule 12.285, of the Florida Family Law Rules of Procedure, relating to attorney's fee issues would help eliminate many discovery disputes. Referring fee disputes to special masters, magistrates or referees may expedite the process, and avoid significant delays. Awarding attorney's fees for litigating the amount of fees may also lead to more settlements and fewer disputes over the amount of fees. These alternatives allow courts to continue to closely monitor the attorney-client relationship, while expeditiously and economically resolving disputes.

Respondent acknowledges that some judges may indeed become experts in attorney's fees after a short time on the bench. However, this is not always the case. Since the Lyle decision in 1964, the State of Florida has grown from approximately 4.9 million residents to over 18 million. See Population of Counties by Decennial Census: 1900 to 1990, U.S. Census Bureau and Population Estimates, Census of Population and Housing, U.S. Census Bureau, 2010. During this same time-period, the number of practicing attorneys has grown from 9,315 in 1965 to 52,643 in 1995. Mike Jay Garcia, Key Trends in the Legal Profession, Fla.

B.J., May 1997. During this time of great growth, the Bar has generally moved toward more specialization, meaning that more attorneys spend a minimum of 50 percent of their time in one area of concentration. Id. This explosion of growth makes it less likely that a judge will be intimately familiar with the practice, fees and reputation of the majority of lawyers practicing before him. Likewise, our judiciary is often specialized as well, spending months, or even years, in one division in which attorney's fees claims may never be litigated (such as the capital murder division). Certainly, a judge who has little experience with the attorneys or the subject matter of the case would greatly benefit from expert testimony concerning the detailed matters set forth in Rule 4-1.5. Even a seasoned judge may find such expert testimony helpful, and sometimes necessary, when dealing with attorneys from out of town, or a novel case or issue.

Neither Petitioner nor the opponents of the rule have demonstrated sufficient hardship or prejudice to litigants in this State to overturn the long-standing rule requiring expert witness testimony to support an award of attorney's fees. The rule is based on the sound proposition that attorneys hold a unique position in society and that the attorney-client relationship is different than other professional relationships. This special position and the unique relationship between attorney and client, and the attorney and the justice system, justifies additional protections

and scrutiny, including the requirement of expert testimony to support a claim for attorney's fees.

ARGUMENT II

The Trial Court Correctly Refused to Grant Petitioner's Demand for Attorney's Fees for Petitioner's Failure to Provide Expert Testimony.

As indicated above, the requirement of expert testimony to support attorney's fee awards is borne out of the unique attorney-client relationship and the special position held by attorneys within the justice system. The need for this additional safeguard is particularly apparent in cases, such as this one, where the attorney is seeking an award of attorney's fees under an hourly rate contract that contains a "final fee" provision entitling the law firm to determine the final fee based on various factors.

The Fourth District Court of Appeal provided an excellent discussion of the various standards for assessing attorney's fees in Franklin & Marbin, P.A. v. Mascola, 711 So. 2d 46 (Fla. 4th DCA 1998). There, the court noted that the Florida Supreme Court had then passed on three sets of circumstances involving discharged attorneys seeking fees from their clients:

> (1) where under a fixed fee or contingency contract the client discharges the lawyer who is without fault before full performance of the contract, under Rosenberg the client is obligated only for quantum meruit not to exceed the contract fee; (2) where the lawyer has fully

> performed a contingency fee contract and the client has been awarded a recovery, under Kelner the client may be held to the full contract fee; and (3) where the lawyer withdraws before a result, but without fault by the client, under Scheller the client may be liable for quantum meruit, less any damages the attorney has caused the client to suffer from the lawyer's refusal to perform, and subject also to a possible forfeiture of the fee.

Id. at 50, (citing Rosenberg, 409 So. 2d 1016; Milton Kelner, P.A. v. 610 Lincoln Road, Inc., 328 So. 2d 193, 196 (Fla.1976); and Searcy Denney Scarola Barnhart & Shipley, P.A. v. Scheller, 652 So. 2d 366 (Fla. 1995)).

Specifically, in Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982), this Court was faced with whether a law firm under a contingency fee agreement, that had been discharged from the representation prior to the occurrence of the contingency, could collect the entire contingency, or whether the firm was limited to quantum meruit damages up to the amount of the fixed fee in the retainer agreement. The Court recognized three distinct theories on how to analyze such problems.

The "Contract Rule" essentially concludes that retainer agreements between lawyers and clients are no different than any other contract, and should be enforced by the courts in accordance with their terms. Thus, if the client terminates the lawyer without cause prior to the occurrence of the contingency, then the damages are the full contract price, limited by the Rules Regulating the Florida Bar related to "clearly excessive" fees. Id. at 1019-1020. The "Quantum Meruit Rule" was designed to allow the attorney the opportunity to recover the reasonable value of

his services if he is discharged without cause. This allows the client to terminate the attorney at any time, but allows the attorney to recover the full value of his services through the date of his discharge, regardless of the terms of the contract. Id. at 1020. Finally, the court discussed the "Quantum Meruit Rule Limited by the Contract Price." Under this rule, where the attorney is discharged without cause, he can recover the value of his services through discharge, not to exceed the contract price. Id. at 1020-1021.

This Court elected to apply the Quantum Meruit Rule Limited by the Contract Price. Id. at 1021-1022. Of particular importance to the Court, was the ability of the client to terminate the attorney at any time. This Court noted that the attorney-client relationship is different than many other types of professional relationships, in that "[t]he client must rely entirely on the good faith efforts of the attorney in representing his interests. This reliance requires that the client have complete confidence in the integrity and ability of the attorney and that absolute fairness and candor characterize all dealings between them." Id. at 1021. The Court held that because of this special relationship, the client should be given more freedom to terminate his attorney than the law gives other employment relationships. The Court approved the ideal that clients must be given the freedom to substitute attorneys without economic penalty "as a broad objective of fostering public confidence in the legal profession." Id. at 1021. For these reasons, the

Court rejected the Contract Rule and the Quantum Meruit Rule. The Court did not limit the application of its ruling to contingency fee cases, and specifically stated "[w]e further follow the California view that in contingency cases, the cause of action for quantum meruit arises only upon the successful occurrence of the contingency," leaving open the proposition that the Court's ruling applied to all cases in which an attorney is discharged before the end of the case. Id. at 1022.

In Franklin & Marbin, the Fourth District Court of Appeals faced a retainer agreement much like the one in this case. 711 So. 2d at 47-48. The retainer agreement in Franklin & Marbin provided for a "reasonable fee" based on set hourly rates, and, like the contract in this case, provided that the failure of the client to object to a billing statement within a specified period of time meant that the billing record was presumed to be correct and reasonable. Id. at 48-49. The Fourth District held the "Contract Rule" applied to this type of fee contract and dispute, and that the contract and the provisions of Rule 4-1.5 governed the liabilities of the parties. Id. at 52. Therefore, the trial court must determine what fee the attorneys were due under the contract, and determine whether the fee violated Rule 4-1.5(a), i.e. "illegal, prohibited, or clearly excessive . . . or . . . generated by employment that was obtained through advertising or solicitation not in compliance with the rules Regulating the Florida Bar" Id.

Petitioner claims that because Franklin & Marbin adopted the "Contract Rule" for periodic fee retainer agreements, the requirement of an expert witness for these cases has been abolished. The Fourth District disagreed with this conclusion, and specifically found that expert witness testimony was required in this case. See Robin Roshkind, P.A. v. Machiela, 45 So. 3d 480 (Fla. 4th DCA 2010).

As set forth above, the attorney-client relationship is different from other professional employment relationships. The attorney-client relationship is the subject of close judicial scrutiny to protect the judicial system, and to protect clients when they are at their most vulnerable. Clients, especially those who are in the process of divorce, must be able to trust their attorneys to be fair with them in all respects, especially in matters relating to fees and costs. The Contract Rule announced in Franklin & Marbin does not mean that attorneys are free to negotiate **any** fee they please. Id. at 51 ("attorney's fee contracts are infused with the public interest and . . . attorneys are not free to negotiate just *any* fee). Instead, Franklin & Marbin made it clear that courts should evaluate attorney's fee applications under the standards of Rule 4-1.5 of the Rules Regulating the Florida Bar. The analysis under the Quantum Meruit Limited by the Contract Rule determines what a "reasonable fee" would be. The analysis in the Contract Rule determines whether the attorney's requested fee is "clearly excessive" under Rule 4-1.5(a).

However, in order to determine whether a fee is "clearly excessive," the threshold issue of a "reasonable fee" must also be determined.

Rule 4-1.5(a) provides that no attorney may collect a fee that is "clearly excessive." A fee is "clearly excessive" under Rule 4-1.5(a)(1) when "after a review of the facts a lawyer or ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a ***reasonable fee*** or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney . . ." (emphasis added). Rule 4-1.5(b) sets forth the following factors to consider in determining a reasonable fee:

> (A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
> (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
> (D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
> (E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
> (F) the nature and length of the professional relationship with the client;
> (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
> (H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

It is impossible to determine whether a fee is "clearly excessive" without first determining a "reasonable fee." Consequently, in a Contract Rule case like Franklin & Marbin, the trial court must engage in a two step process: first the court must determine a reasonable fee for the services under Rule 4-1.5(b); and second, the court must determine whether the attorney's requested fee is "clearly excessive" based on the criteria of Rule 4-1.5(a). Certainly, expert testimony regarding whether a "lawyer of ordinary prudence" would consider a fee to be clearly excessive would be of assistance to the trial court. Moreover, heightened level of scrutiny of attorney's dealings with clients dictates the continued requirement of expert testimony to support fee awards under these circumstances.

The requirement for expert testimony is particularly important in this case. Petitioner's Retainer Agreement contained a number of onerous terms. In the first instance, although the contract referenced specific hourly rates, the Agreement provided that the "final fee" would be determined solely by the Petitioner based on "cherry picked" items from former Rule DR.2-106(B) of the Code of Professional Responsibility. The contract, which was signed in 2008, failed to cite the current version of the Rules Regulating the Florida Bar.[2] Rather than determine the "final fee" in accordance with all of the guidelines set out in the current rule, the Retainer

[2] On January 1, 1987, the Code of Professional Responsibility ceased to govern lawyers in Florida. The Code was replaced by the Rules of Professional Conduct, which is Chapter 4 of the Rules Regulating the Florida Bar.

Agreement drafted by Petitioner determined the "final fee" based on the "amount of work involved, difficulty of the case, skill required, reputation and expertise of counsel and time limitations imposed by the client or circumstances." The Retainer Agreement ignored the Bar Rule's requirement to consider "the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature; and the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained."

The Retainer Agreement also provided that the client waived a trial by jury and agreed to arbitrate all disputes relating to fees. The client also waived the dischargeability of the debt for fees in bankruptcy, and, most egregiously, the Retainer Agreement conveyed a lien, not just over the proceeds of the subject of the litigation, but over all real and personal property owned by the client in any state in the United States, including homestead. Finally, the Retainer Agreement allowed the firm to withdraw if Ms. Machiela failed to make any of the myriad of payments required by the Agreement, including pre-payment of anticipated fees for trial. The Agreement even specified that Ms. Machiela's signature constituted "consent" to the withdrawal, as well as "consent" to the law firm's motion to adjudicate attorney's charging lien and for a money judgment. Although the

contract provided that Ms. Machiela had the opportunity to seek separate counsel regarding the Retainer Agreement, there is no evidence in the record that she actually did so. If the courts should require procedural and substantive protections for clients in attorney's fee claims in any case, this is it.

At the hearing on Petitioner's motion seeking the award of attorney's fees, the Petitioner, a law firm, was represented by the attorney primarily responsible for the representation as well as separately retained counsel. Ms. Machiela was apparently unrepresented at the hearing. The trial court heard only the testimony of the Petitioner in support of the attorney's fee request, and heard no expert testimony, even though the firm had retained separate counsel and separate counsel was at the hearing and available to testify. Respondent submits that the same grounds for the close scrutiny of attorneys' various activities referenced above, require that the Court receive expert testimony that the attorney's fees charged by Petitioner and the dealings with its client are fair and reasonable under the guidelines of the Rules Regulating the Florida Bar.

Arguably, periodic fee retainer agreements, like the one in this case, are more susceptible to abuse than the contingency fee contracts at issue in Rosenberg. In Ms. Machiela's case, the firm has the ability to "hold her hostage" to its rates and charges, whether they are reasonable or not. If she complains about a billing, and refuses to pay, the firm can immediately withdraw, place a lien on her home

and any other property she owns, and under the contract, she can do nothing about it. Adding insult to injury, she now must retain new counsel, pay for new counsel to become familiar with the case, and then fight with Petitioner over whether she can receive her file based on Petitioner's "retaining lien." If, on the other hand, she silences her inner complaints, and continues to pay, she is left with the uncertainty of the "final fee" that is determined in the sole discretion of the firm based on only a few of the guidelines set out in the Rules Regulating the Florida Bar. Even if she settles the case, according to the Retainer Agreement, Petitioner may refuse to set a final hearing until the client has paid all outstanding balances, including the "final fee" and prepay the anticipated charges associated with the settlement hearing. Fee contracts, such as this, that are neither specifically contingent on a future event, nor certain in terms of billing by the hour, are the most susceptible to abuse, and therefore require the closest scrutiny. Expert testimony concerning the reasonableness of the fee should always be required when a contract like this is terminated.

Petitioner's reliance on Gossett & Gossett, P.A. v. Mervolion, 941 So. 2d 1207 (Fla. 4th DCA 2006) is misplaced. In Gossett, the attorney sought to enforce a charging lien on specific property. Id. at 1208-1209. Here, as pointed out by the trial court, there was no final judgment, and therefore no "res" upon which to place a charging lien. Moreover, Gossett was a Contract Rule case, requiring the trial

court to determine whether the fee was "clearly excessive," rather than a quantum meruit case, requiring the trial court to set the fee based on "reasonableness." The trial court in Gossett was properly overturned because it made no finding that the fee was "clearly excessive" under Rule 4-1.5(a). However, regardless of whether the analysis under the Contract Rule or Quantum Meruit Rule, expert testimony is required.

Petitioner likewise cannot rely on Sea World of Florida, Inc. v. Ace American Ins. Co., Inc., 28 So. 3d 158 (Fla. 5th DCA 2010), to support its contention. In that case, an insurance carrier sought damages against an indemnitor for attorney's fees already incurred and paid. The indemnitor has no standing to challenge the reasonableness of the attorney's fees, especially in the circumstance present in that case, where the indemnitor had the chance to indemnify and defend the indemnitee. Id. at 159.

CONCLUSION

As fiduciaries of their clients and officers of the courts, attorneys' interactions with their clients are subject to the strictest scrutiny. Nowhere is this scrutiny more important than in an attorney's fees charged to his client, especially where the attorney seeks the court's approval of those fees. Expediency of litigation should take a back-seat to the preservation of the public trust in the judicial system, and in the judicial system's protection of those who come before it seeking justice. The long-standing rule requiring expert testimony to support attorney's fee claims is one component of those protections against abuse and shields against the erosion of public trust. The rule should be upheld and the trial court affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been submitted by U.S. Mail to Robin Roshkind, Esquire, 625 N. Flagler Dr., Ste 509, West Palm Beach, FL 33401 and Robin Bresky, Esquire, Law Offices of Robin Bresky, 7777 Glades Road, Suite 110, Boca Raton, FL 33434, this **18th day of January**, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Answer Brief is in compliance with the font requirement of Florida Rule of Appellate Procedure 9.210.

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