IN THE SUPREME COURT OF FLORIDA

PATRICIA YOUNG et al.,
Petitioners,

v.

NORVA L. ACHENBAUCH et al.,
Respondents.

Case No.: SC12-988
L.T. No.: 3D11-2129 & 3D11-2141

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

PETITIONERS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONAL
PROVISIONS AND RULES OF COURT

STATEMENT OF THE CASE AND OF THE FACTS

The petitioners, Flight Attendant Medical Research Institute ("FAMRI"), Patricia Young, and Alani Blissard, seek review to resolve conflicts regarding when a lawyer should be disqualified based on a conflict of interest and to prevent the district court, having found the rules of professional conduct regarding conflict to be "inadequate," from usurping this Court's constitutional duties by replacing these rules with a balancing test requiring former clients prove "actual prejudice."

Petitioner FAMRI is a foundation that funds research for the early detection and cure of tobacco-related diseases and was created as part of a class action settlement with the tobacco companies approved in *Ramos v. Philip Morris Cos.*, 743 So. 2d 24 (Fla. 3d DCA 1999). (Op. 2-3.) *See generally Broin v. Philip Morris Cos., Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994) (explaining propriety of certifying class of 60,000 flight attendants exposed to second-hand smoke). The respondents are individual flight attendants represented by Philip Gerson and Steven Hunter in separate lawsuits filed against tobacco companies after the class action concluded.[1] (Op. 3.) Petitioners Young and Blissard are former class members who were appointed to serve on FAMRI's board and who assert that they were also

[1] The decision does not identify the respondents and retains the caption from the original class action proceeding, which might give the impression that the respondents are a class. (Op. 1.) To the contrary, the respondents are 261 individual flight attendants represented by Mr. Gerson and Mr. Hunter in individual actions against tobacco companies, comprising but a tiny fraction of the over 60,000 original class members.

represented by Mr. Gerson and Mr. Hunter in their individual actions against tobacco companies. (Op. 3.)

Messrs. Gerson and Hunter sought post-judgment relief in the closed *Broin* case to enjoin FAMRI from further expenditures and to instead distribute the settlement funds from the research foundation to the respondents. (Op. 3.) The decision below, which quashes the trial court's order disqualifying Messrs. Gerson and Hunter as counsel for the respondents in this attack against FAMRI,[2] expresses three holdings. First, after summarizing the requirements of Florida Rules of Professional Conduct 4-1.7 and 4-1.9, which do not require proof of actual prejudice, the district court rejected those rules in favor of a new balancing test it borrowed from a few federal court decisions from outside Florida:

> The need to balance the traditional rules of loyalty to a client, duties to the court, and duties to the class as a whole, calls for adaptation of the traditional conflict model. ….
>
> The mere appearance or possibility of conflict is not enough in this context. ….
>
> This case demonstrates why Florida's Rules of Professional Conduct alone are inadequate to resolve conflict of interest problems typical to class action cases. ….
>
> The federal courts' approach affords a better method for determining when to disqualify an attorney for conflict of interest in the context of a class action. This approach balances a party's right to select his or her own counsel against a client's right to the undivided

[2] The trial court did not disqualify them from continuing to represent the respondents in their individual lawsuits against tobacco companies.

> loyalty of his or her counsel. Accordingly, we conclude that, before disqualifying a class member's attorney on the motion of another class member, the court should balance the actual prejudice to the objector with his or her opponent's interest in continued representation by experienced counsel.

(Op. 8-11.)

Second, the court concluded that Rule 4-1.7, which governs conflicts among current clients, did not apply at all because "there is no evidence that Mr. Gerson and Mr. Hunter currently represent the respondents." (Op. 10.) But the opinion expressly noted that this was so only because when they learned that the only individual petitioner they "personally represented"[3] opposed their plan to sue the foundation on whose board she served, they "withdrew representation." (Op. 10.)

Third, the decision notes that "[t]he trial court here did not engage in the balancing approach" that the district court had just adopted to replace the test from Rule 4-1.9 regarding conflicts with former clients. (Op. 11.) Applying this new test de novo, the opinion concludes that the respondents' "right to be represented by experienced counsel of their choice is [sic] outweighed by any prejudice to the" petitioners. (Op. 11.) (The district court clearly meant "not outweighed.")

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[3] The opinion does not identify which one, and the trial court determined that these lawyers represented and then abandoned both petitioners (plus other objecting clients). But this brief pretends that only one of the petitioners was a client because conflict jurisdiction is confined to the four corners of the district court's decision. *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986).

SUMMARY OF ARGUMENT

The first holding conflicts with decisions holding that the rules of professional conduct provide the exclusive standard for lawyer disqualification. The second holding conflicts with decisions holding that a lawyer may not abandon current clients in order to take a more lucrative position against their interest. The third holding conflicts with decisions holding that a disqualification order is reviewed only for an abuse of discretion. In light of its constitutional duty and exclusive jurisdiction to regulate the bar, the Court should exercise its discretion to resolve these conflicts and review this decision purporting to free class action lawyers from complying with the rules of professional conduct. Review by this Court is necessary to protect the public, provide certainty to the bar, and maintain public confidence in the legal system.

ARGUMENT

I. THIS COURT HAS JURISDICTION UNDER ARTICLE V, SECTION 3(B)(3) OF THE FLORIDA CONSTITUTION BECAUSE THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL.

A. The decision below conflicts with decisions regarding whether the rules of professional conduct provide the exclusive standard for disqualifying counsel based on conflicts of interest.

First, the Third District's decision conflicts with the many decisions that hold, "An order involving the disqualification of counsel must be tested against the standards imposed by the Rules of Professional Conduct." *Harvey E. Morse, P.A.*

v. Clark, 890 So. 2d 496, 497 (Fla. 5th DCA 2004); *accord State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 & n.1 (Fla. 1991); *Kaplan v. Divosta Homes, L.P.*, 20 So. 3d 459, 462 (Fla. 2d DCA 2009).

Directly contrary to these express holdings, the decision below finds the rules not only to require "adaptation," but "inadequate" in the class action context.[4] (Op. 8, 10.) It concludes that "[t]he mere appearance or possibility of conflict is not enough" even though the rules of professional conduct require disqualification based on a presumption of disclosure of confidences and prejudice when current clients are adverse to each other or a former client is adverse to a current client in a "substantially related matter." (Op. 9.) *See K.A.W.*, 575 So. 2d at 633-34 (noting that Rule 4-1.9 "acknowledges the difficulty of proving that confidential information useful to the attorney's current client was given to the attorney" and "protects the [former] client by not requiring disclosure of confidences previously given to the attorney"). And the decision concludes that "[t]he federal courts' approach affords a better method" than the rules of professional conduct. (Op. 10.)

[4] The decision should not be read to mistakenly suggest that Mr. Gerson and Mr. Hunter were lawyers for the former class. Stanley and Susan Rosenblatt, who are also FAMRI board members, were class counsel. Mr. Gerson and Mr. Hunter played no role in the class litigation; their involvement was limited to filing individual actions against tobacco companies pursuant to the terms of the settlement after the class was decertified. Thus, the federal class action decisions on which the district court relied do not seem to fit this case. But this is a merits issue that is not relevant at the jurisdiction stage. *Reaves*, 485 So. 2d at 830 n.3.

While the foregoing cases do not involve conflicts between class members, none can be construed to allow the test for disqualification to vary depending on the kind of case at issue; they clearly recognize an across-the-board test governed exclusively by the rules. And additional conflict cases expressly reject fact-specific arguments at variance with the rules. *Lincoln Assocs. & Const., Inc. v. Wentworth Const. Co., Inc.*, 26 So. 3d 638, 639 (Fla. 1st DCA 2010); *Edward J. DeBartolo Corp. v. Petrin*, 516 So. 2d 6, 7 (Fla. 5th DCA 1987). In any event, this Court has conflict jurisdiction to review the misapplication of a rule to a different factual setting. *E.g.*, *Rippy v. Shepard*, 80 So. 3d 305, 306 (Fla. 2012); *F.I.G.A. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 189 & n.1 (Fla. 2011); *Jaimes v. State*, 51 So. 3d 445, 446 (Fla. 2010); *Wallace v. Dean*, 3 So. 3d 1035, 1039 (Fla. 2009).

B. The decision below conflicts with decisions regarding whether a lawyer may abandon a current client to pursue a more lucrative claim to the client's detriment.

Second, when Mr. Gerson and Mr. Hunter decided to seek to enjoin and liquidate FAMRI, they still represented one of the petitioner FAMRI board members.[5] The decision makes this clear because it notes that they only "withdrew representation upon notice of the client's objection." (Op. 10.) By holding that a

[5] Because an action against FAMRI was necessarily adverse to its board members, this was not a conflict that arose after these lawyers decided to attack FAMRI. *Cf.* R. Regulating Fla. Bar 4-1.7 (comment) (noting that a lawyer may withdraw from representing one client and potentially continue representing the other only when the "conflict arises after the representation has been undertaken").

lawyer avoids Rule 4-1.7's absolute prohibition against taking action against the interest of a client by simply withdrawing (Op. 10), the decision directly conflicts with this Court's holding in *The Florida Bar v. Adorno*, 60 So. 3d 1016, 1024-25 (Fla. 2011), that a class action lawyer violated Rule 4-1.7 by abandoning the interests of some class members to pursue a more lucrative position against their interest in favor of other class members. *See also The Florida Bar v. St. Louis*, 967 So. 2d 108, 120-21 (Fla. 2007) (lawyer violated Rule 4-1.7 by telling clients that he would cease representing them unless they accepted a settlement that benefitted him at their expense).

C. The decision below conflicts with decisions regarding the standard of review for orders disqualifying counsel.

Third, the decision below emphasizes that the trial court did not apply the federal balancing test adopted by the district court. (Op. 11.) By proceeding to apply that test de novo, the decision directly conflicts with the many decisions holding that a trial court's ruling disqualifying counsel is reviewed only for an abuse of discretion. *E.g., Kaplan*, 20 So. 3d at 461 (Fla. 2d DCA 2009); *Applied Digital Solutions, Inc. v. Vasa*, 941 So. 2d 404, 408 (Fla. 4th DCA 2006); *Campellone v. Cragan*, 910 So. 2d 363, 365 (Fla. 5th DCA 2005). And by applying a new fact-intensive test on appeal where the Petitioners had no opportunity to present evidence and argument on the new "balancing test," the decision conflicts with this Court's holding in *Robertson v. State*, 829 So. 2d 901,

908-09 (Fla. 2002), that a district court may not decide an appellate proceeding on a ground on which the parties "never received an opportunity to present evidence or make argument."[6] Thus, this Court has conflict jurisdiction on multiple grounds.

II. THE COURT SHOULD EXERCISE ITS DISCRETION TO RESOLVE THESE CONFLICTS.

The issues at stake are so important that the Court should exercise its discretion to accept jurisdiction. The decision below purports to free Florida class action lawyers from the requirements of the rules of professional conduct and to force their "former clients" to disclose all their confidential communications and prove that the prejudice of losing their lawyer's loyalty outweighs the right of other clients to sue them through their former counsel. Not only does this defeat the important policies espoused in *K.A.W.* and *Adorno*, but it will spawn confusion among the bar and undermine public confidence in our whole legal system. *See Harte Biltmore Ltd. v. First Pa. Bank*, 655 F. Supp. 419, 422 (S.D. Fla. 1987) ("Public confidence in lawyers and the legal system must necessarily be undermined when a lawyer suddenly abandons one client in favor of another.").

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[6] The Petitioners had no reason to put on all available evidence of actual prejudice or provide the details of the confidences they disclosed because, under the test rejected by the district court, the disclosure of confidential information and resulting prejudice are presumed and disqualification required when a lawyer represents a new client adverse to a former client in a substantially related matter. *K.A.W.*, 575 So. 2d at 633-34.

Indeed, this Court has both the constitutional duty and the exclusive jurisdiction to create and modify the rules governing lawyer conduct. Art. V, § 15, Fla. Const.; *The Fla. Bar v. McCain*, 330 So. 2d 712, 714 (Fla. 1976); *see also Adorno*, 60 So. 3d at 1018 ("As the number of lawyers increases to an unprecedented level, the responsibility of ensuring that all lawyers conduct themselves within the ethical bounds required by the Rules Regulating the Florida Bar continues to be a top priority for this Court."). Even absent conflict jurisdiction, this Court would have all-writs jurisdiction to review the district court's holding that the rules of professional conduct are "inadequate." *See Roberts v. Brown*, 43 So. 3d 673, 677-78 (Fla. 2010) (exercising all writs jurisdiction to protect exclusive jurisdiction granted by article V).

The district court's rejection of this Court's professionalism rules and its holding in *K.A.W.* should be especially troubling and demonstrates why review in this Court is especially warranted here. As this Court has explained in emphasizing the requirement that district courts of appeal follow its holdings:

> This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court.

Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973); *see also Continental Assur. Co. v. Carroll*, 485 So. 2d 406, 409 (Fla. 1986) (noting that "no district court can

legitimately circumvent a decision of this Court" and that the "proper course" would have been to rule in accordance with precedent "and then certify the question to this Court"); *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) (noting that a district court cannot decline to follow a supreme court holding just because federal courts had issued contrary decisions).

Finally, this case is important in its own right. For thirty percent of the take, Messrs. Gerson and Hunter seek to destroy a Florida non-profit foundation that underwrites millions of dollars for important scientific research based on claims that their former clients (and the rest of FAMRI's board of trustees) are breaching some duty to the long-decertified class. And these clients previously had shared confidences related to the many reasons why FAMRI cannot provide the very relief their former lawyers now seek – distribution of settlement funds to class members.[7] Review by this Court is the last chance to remedy this ultimate betrayal.

CONCLUSION

For all of these reasons, this Court should grant review to protect the public, provide certainty to the bar, maintain confidence in the system, and do justice.

[7] This fact is reflected in the trial court's ruling, but not the district court's opinion. Accordingly, it is a fact that is not relevant to whether this Court possesses conflict jurisdiction. *Reaves*, 485 So. 2d at n.3. But once conflict jurisdiction has been established, *Reaves* does not mean that the Court should be blind to the true facts in determining whether, in its discretion, it should devote its limited resources to review a particular case over which it has jurisdiction.

Respectfully submitted,

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