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IN THE SUPREME COURT OF FLORIDA

LOUIS P. PFEFFER and FRANK CERINO,

Petitioners,

v.

LABOR READY SOUTHEAST, INC., et
al.,

Respondents.

CASE NO.: SC14-1325

DCA NO.: 1D13-4779

L.T. NO.: 09-021393SHP

BRIEF OF AMICUS CURIAE,
THE WORKERS' COMPENSATION SECTION
OF THE FLORIDA BAR

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CONCISE STATEMENT OF THE IDENTITY OF THE
AMICUS CURIAE PARTY AND ITS
INTEREST IN THE CASE

The Workers' Compensation Section (the "Section") of The Florida Bar is an organization within The Florida Bar, which is open to all members in good standing of The Florida Bar who have a common interest in the workers' compensation law. The Section provides a forum for discussion and exchange of ideas leading to the improvement of individual trial and appellate abilities in workers' compensation cases. The Section further assists the workers' compensation judiciary in establishing methods for the more certain and expeditious administration of justice.

The Section attempts to increase members' effectiveness in trial and appellate review of workers' compensation cases with a view toward better service to their clients and the cause of justice. Finally, the Section aids in the development of the workers' compensation law in order to serve the public generally and The Florida Bar specifically in interpreting and carrying out the public and professional needs and objectives in the field.

The Section's arguments in this brief are based on the Section's duly adopted Legislative position number 8, which reads, "[The Section] opposes legislation restricting the payment of attorney's fees - either to the attorney of the

injured worker or to the attorney for the employer / carrier / self-insured."

This brief was reviewed and approved by the Executive Committee of the Board of Governors of The Florida Bar on December 22, 2014 consistent with applicable standing board policies. It is tendered solely by the Section and supported by the separate resources of this voluntary organization - not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

SUMMARY OF ARGUMENT

Florida lawyers may provide legal services to any client for a reasonable fee. If the issue is workers' compensation, however, and the client is an injured worker, providing any paid legal service to that client outside the strict constraints of section 440.34(1), Fla.Stat. (2009) is unlawful, subjecting the lawyer to a prison term of up to one year. Reasonable fees are expressly precluded by section 440.34(1).

Under section 440.34(1), fees are payable only where an attorney first obtains benefits for a client and the fee must be calculated based on a fixed formula, which allows no deviation either upward or downward. The fee is the same regardless of whether it is paid by the client or the opponent. A Judge of Compensation Claims ("JCC") must approve all fees. JCCs may approve only those fees that comport with the formula. A lawyer who accepts a fee of even \$1.00 without approval is subject to criminal prosecution.

This Court has the inherent authority to regulate and enforce attorney ethics. In exercising that authority, the Court promulgated rules governing how lawyers must calculate their fees. Those rules are part of the ethics code. All attorneys' fees must be calculated utilizing the rules, but the legislature has precluded the use of the rules in workers' compensation

cases.

The judicial branch, not the legislative or executive branches, possesses inherent power to oversee attorneys and their fees. Section 440.34(1), which mandates a fixed fee formula, which does not permit deviation upward or downward, and which criminalizes attorneys' fees not calculated using the formula, violates the separation of powers.

ARGUMENT

SECTION 440.34(1), FLA. STAT. (2009), WHICH MANDATES A FIXED AND INFLEXIBLE FEE FORMULA, WHICH DOES NOT PERMIT DEVIATION UPWARD OR DOWNWARD, AND WHICH CRIMINALIZES ATTORNEYS' FEES NOT CALCULATED USING THE FORMULA, VIOLATES THE SEPARATION OF POWERS.

A. The brief expressly supports neither party in this case

This brief is intended to express the position of the Section and is based on the Section's Florida Bar-approved Legislative Position No. 8. The brief neither expressly supports either party to the case nor endorses any of their arguments.

B. Standard of Review

The standard of review is *de novo*. See *Browning v. Florida Hometown Democracy, Inc., PAC*, 29 So.3d 1053, 1063 (Fla. 2010).

C. Argument on the merits

A licensed Florida attorney may provide legal services to a

client for a reasonable fee in connection with myriad legal issues, subject to the Rules Regulating The Florida Bar. If that issue is workers' compensation, however, and the client is an injured worker, providing any paid legal service to that client outside the strict constraints of section 440.34(1), Fla.Stat. (2009) is a first degree misdemeanor.

Under section 440.34(1), fees are payable only where an attorney first obtains benefits for his client and the fee must be calculated based on a fixed formula, which allows no deviation either upward or downward. The fee is the same regardless of whether it is paid by the client or the opponent. A Judge of Compensation Claims ("JCC") must approve all fees. JCCs are members of the executive branch. JCCs may approve only those fees that comport with the formula:

"440.34 Attorney's fees; costs.—

(1) A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first \$5,000 of the amount of the benefits secured, 15 percent of the next \$5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years."
(emphasis added).

It is unlawful for a Florida lawyer to accept a fee from or on behalf of an injured worker unless a JCC approves it:

"440.105 Prohibited activities; reports; penalties; limitations.-

(3) **Whoever violates any provision of this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.**

(c) **It is unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims or by the Deputy Chief Judge of Compensation Claims."** (emphasis added). ¹

Thus, a fee may not be charged unless benefits are obtained first, and there are no exceptions. That fee must be calculated using the formula, and there are no exceptions. ² The fee must then be approved by a JCC to assure that the fee meets those requirements, and there are no exceptions. A fee charged in any

¹ This provision has been applied only to attorneys representing injured workers. See *Altstatt v. Fla. Dep't of Agric.*, 1 So.3d 1285, 1286 (Fla. 1st DCA 2009) ("We find it unnecessary to decide whether the legislature intended section 440.105(3)(c) to apply to requests for payments made by attorneys representing employers, carriers and servicing agents, as well as to those made by attorneys representing claimants.").

² Section 440.34(5) authorizes reasonable fees for appellate work, and section 440.34(7) permits a one-time hourly fee (capped at \$1,500.00) for medical benefits obtained. Neither is implicated here.

other manner is unlawful. A lawyer who accepts a fee of even \$1.00 without having first successfully obtained benefits is subject to criminal prosecution and up to a year in prison.

The Legislature first attempted to create an absolute restriction on fees payable to lawyers representing injured workers in a 2003 Special Legislative Session, an effort thwarted by this Court in *Murray v. Mariner Health*, 994 So.2d 1051 (Fla. 2008). *Murray* led to the almost immediate passage of section 440.34(1), Fla. Stat. (2009), which deleted the word "reasonable," and which is at issue here.

Section 440.34(1), which mandates a fixed and arbitrary fee amount, requires Florida attorneys to accept fees that are both unreasonably low and unreasonably high. It further precludes fees where benefits are not obtained, criminalizing paid legal services that result in no award. Section 440.34(1) is a non-rebuttable presumption that the ethical, reasonable, and appropriate fee is the one determined by the formula. In reality, the formulaic fee is most commonly unreasonably low or unreasonably high. When it does result in a reasonable fee it is only through luck.

Consider, for example, an attorney that reasonably devotes 100 hours of time trying a case, resulting in an award of benefits valued at \$5,000.00. The fixed, inflexible fee is

\$1,000.00, or \$10.00 per hour, which is unreasonably low. No other fee is permissible. Where an attorney spends only 1 hour of time, but settles the case for \$1,000,000.00, the fixed, inflexible fee is \$100,750.00, which may be unreasonably high. No other fee is permissible.

Even where an injured worker has the desire, the sophistication, and sufficient funds, he is legally prohibited from negotiating a reasonable fee with an attorney. That injured worker may not pay by the hour; may not agree to a flat fee; and may not enter into a contingency fee agreement as provided in R. Regulating Fla. Bar 4-1.5. A lawyer who charges a fee for merely providing legal advice faces up to a year in prison.

Article II, Section 3 of the Florida Constitution provides that:

"The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

This Court has the inherent authority to regulate and enforce attorney ethics. In exercising that authority, the Court promulgated rules governing how lawyers must calculate fees. Those rules are part of the ethics code. The legislature may not interfere with a lawyer's ethical obligations. As stated by this

Court in *Abdool v. Bondi*, 141 So.3d 529, 553 (Fla. 2014):

"This Court has the inherent authority to adopt and enforce an ethical code of professional conduct for attorneys. See *In re The Florida Bar*, 316 So.2d 45, 47 (Fla.1975) ("The authority for each branch to adopt an ethical code has always been within the inherent authority of the respective branches of government.... The judicial branch has ... a code of professional responsibility for lawyers, and, in addition, has the procedure to interpret them and the authority to enforce them...."). The Legislature, therefore, is without authority to directly or indirectly interfere with an attorney's exercise of his or her ethical duties as an officer of the court. See *Times Pub. Co. v. Williams*, 222 So.2d 470, 475 (Fla. 2d DCA 1969), *overruled in part by Neu v. Miami Herald Pub. Co.*, 462 So.2d 821, 825 (Fla.1985). **A statute violates the separation of powers clause when it interferes with the ethical duties of attorneys, as prescribed by this Court.**" (emphasis added).

According to Timothy Chinaris, former Florida Bar Ethics Director who testified below, a lawyer's fees implicate the exercise of the lawyer's ethical duties, and the regulation of both excessive and inadequate fees is the province of the judicial branch. (R-137, 156, 157, 163, 166, 168, 172). Mr. Chinaris explained that R. Regulating Fla. Bar 4-1.5 governs attorneys' fees "in terms of requirements that you need to follow to ethically charge or collect fees..." (R-153). According to the comment following Rule 4-1.5:

All legal fees and contracts for legal fees are subject to the requirements of the Rules

Regulating The Florida Bar. In particular, the test for reasonableness of legal fees found in rule 4-1.5(b) applies to all types of legal fees and contracts related to them." (emphasis added).

The Rule does not exempt fees charged in workers' compensation cases. Rule 4-1.5 addresses all legal fees. This Court is responsible for the regulation of lawyers and their ethical obligations. Fees that are either unreasonably low or unreasonably high implicate ethics, and this Court has jurisdiction over lawyer ethics.

According to this Court:

"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." *Baruch v. Giblin*, 122 Fla. 59, 164 So. 831 (1935).

To meet this public interest, this Court adopted Rule 4-1.5(a), which precludes illegal, prohibited or clearly excessive fees. Subdivisions (b) and (c) set forth the factors that must be utilized in calculating fees. In *Rowe and Searcy, Denney, Scarola, Barnhart & Shipley P.A. v. Poletz*, 652 So.2d 366 (Fla.

1995), this Court held that these factors are applicable in determinations of reasonable fees whether the client or the opponent is to pay them.

In *Chandris, S.A. v. Yanakakis*, 668 So.2d 180 (Fla. 1995), this Court held that fee contracts that do not comply with the lawyer disciplinary rules are void as against public policy. See also *American Casualty Co. v. Coastal Caisson Drill Co.*, 542 So.2d 957, 958 (Fla. 1989); *City of Miami v. Benson*, 63 So.2d 916 (Fla. 1953); *City of Leesburg v. Ware*, 113 Fla. 760, 767, 153 So. 87, 90 (1934). Respectfully, the legislature exceeded its authority by enacting section 440.34(1), Fla.Stat. (2009), which expressly forbids reasonable fees and instead prescribes fees that are often unreasonable.

The primary objective of the Courts is to administer justice. See *Glass v. Parrish*, 51 So.2d 717, 721 (Fla. 1951). "Lawyers are officers of the court and justice should be administered economically, efficiently, and expeditiously. Attorney's fees are an important factor in the administration of justice, and if they are fixed without proper relationship to these facts it could result in a loss of public confidence in the bench and bar." *Zorovich v. Stoller*, 293 So.2d 788, 791 (Fla. 3d DCA 1974). Attorneys' fees may not be excessive, but

conversely, they cannot be so inadequate as to be confiscatory of a lawyer's time and talent.

In a workers' compensation case, the fee is presumptively the responsibility of the injured worker. See section 440.34(3), Fla.Stat. The legislature, however, granted prevailing party fees to injured workers. See section 440.34(3) (a)-(d), Fla.Stat. The legislature did so, however, in a manner that results in unreasonably low (or high) fees. Where the legislature provides for prevailing party fees, it must do so in a manner that does not result in a fee amount that is unreasonable, arbitrary, or capricious.

In *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986), this Court invalidated as applied strict legislative caps on fees payable to lawyers appointed to represent indigent criminal defendants:

"In summary, we hold that it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents."

While *Makemson* is based in part on the Sixth Amendment, its reasoning has been applied in non-criminal contexts. For example, *Makemson's* analysis has been applied in civil

dependency proceedings. See *Bd. of County Comm'rs of Hillsborough County v. Scruggs*, 545 So.2d 910, 912 (Fla. 2d DCA 1989); *Metro. Dade County v. Faber*, 564 So.2d 185 (Fla. 3d DCA 1990). *Makemson's* foundation is the separation of powers doctrine:

"Against this backdrop, we note the fundamental proposition espoused in this state that 'the courts have authority to do things that are absolutely essential to the performance of their judicial functions[.]' *Makemson v. Martin County*, 491 So.2d 1109, 1113 (Fla.1986), cert. denied, 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987) (quoting *Rose v. Palm Beach County*, 361 So.2d 135, 137 (Fla.1978)). An essential corollary to the preservation of this judicial authority is the principle that '[a]ny legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.' *Simmons v. State*, 160 Fla. 626, 628, 36 So.2d 207, 208 (Fla.1948) (quoting 11 Am.Jur. 908). These precepts have their genesis in the doctrine of the separation of powers, which has as its goal the preservation of the inherent powers of the three branches of government and the prevention of one branch from infringing on the powers of the others to the detriment of our system of constitutional rule. *Daniels v. State Rd. Dep't*, 170 So.2d 846 (Fla.1964)." *Walker v. Bentley*, 660 So.2d 313, 320 (Fla. 2d DCA 1995).

Applying *Makemson*, the legislature may not unreasonably restrict fees in a manner that is confiscatory of the lawyer's time because unreasonably low fees preclude effective representation. Section 440.34(1)'s non-rebuttable presumption that the formulaic fee is proper usurps the authority of the

judiciary and violates the separation of powers.

Mr. Chinaris also testified that section 440.34(1) creates a conflict of interest for attorneys. (R-154-56). An attorney's failure to avoid prohibited conflicts of interest constitutes grounds for disciplinary proceedings. See *The Florida Bar v. Brown*, 978 So.2d 107 (Fla. 2008). According to Mr. Chinaris, attorneys' fees must be reasonable. If fees are too low, justice suffers. If fees are too high, the credibility of the legal system is called into question. (R-156-157).

The legislature cannot mandate unreasonable fees because it encroaches on a judicial function, harms the public, and limits the independence of attorneys. A direct correlation exists between reasonable fees and competent and zealous representation that is free from conflicts of interest. According to Mr. Chinaris, attorneys who receive inadequate fees are subject to failing to meet their professional obligations to provide competent and zealous representation. (R-156).

In Florida Bar Ethics Opinion 98-2 (June 18, 1998) the Bar ruled that an attorney may not ethically enter into a fee agreement in which "the set fee is so low as to impair her independent professional judgment or cause her to limit the representation" of a client. In so ruling, the Bar adopted verbatim Ohio Ethics Opinion 97-7, which concluded:

"[A]n attorney or law firm may enter into a contract with a liability insurer in which the attorney or law firm agrees to do all or a portion of the insurer's defense work for a fixed flat fee. However, the fee agreement must provide reasonable and adequate compensation; it must not be excessive or so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate. The fee agreement must not adversely affect the attorney's independent professional judgment; the attorney's representation must be competent, zealous, and diligent; and the expenses of litigation, in addition to the flat fee, must ultimately be borne by the insurer."

Section 440.34(1) requires lawyers to violate the principles reflected above. Where the potential recovery is known to be low, the paucity of the resultant fee has the potential to compromise the attorney's professional obligations as a competent and zealous advocate. Conversely, where the recovery is very high, the statute permits no deviation downward from the mandatory formula, thereby compelling the lawyer to charge a potentially unreasonable fee.

In *Irwin v. Surdyks Liquor*, 599 N.W. 2d 132 (Minn. 1999) the Supreme Court of Minnesota invalidated a fixed and inflexible workers' compensation fee formula because it violated the separation of powers. While the Court recognized the legislature's prerogatives over the workers' compensation laws, the compulsory fee calculation was invalid:

"This limitation goes beyond merely indicating

what the legislature deems desirable. Even as here, where there was a finding that the fees awarded were inadequate to reasonably compensate relators' attorney, the legislature has prohibited any deviation from the statutory maximum. Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees. This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers of Minn. Const. art. III, § 1. Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional."

The Supreme Court of Minnesota's analysis is sound and applicable here.³ The judicial branch, not the legislative or executive branches, possesses "inherent power to oversee attorneys and attorney fees." Section 440.34(1), which mandates a fixed fee formula, which does not permit deviation upward or downward, and which criminalizes fees not calculated using the formula, violates the separation of powers.


³ Compare *David v. Bartel Enterprises (Nitro Green)*, --- N.W.2d ----, 2014 WL 6677330 (Minn. Nov. 26, 2014) (Unlike *Irwin*, which addressed inadequate fees, *David* addressed excessive fees. It reaffirmed *Irwin*, recognized that the legislature's formulation of attorneys' fees for workers' compensation cases was 'presumptively reasonable,' and ruled that judicial review of whether the statutory formula resulted in excessive fees would occur in exceptional circumstances).

CONCLUSION

The Section respectfully submits that Section 440.34(1), Fla. Stat. (2009) violates the separation of powers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been filed with the Supreme Court of Florida and was separately served by electronic mail to the following on December 22, 2014: Louis P. Pfeffer, Esq., lpfeffer@pfefferlaw.com; Michael J. Winer, Esq., mike@mikewinerlaw.com; David Lamont, Esq., diamont@bleakleybavol.com; and R.G. McCormick, Jr., Esq., mmccormick@bleakleybavol.com.


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CERTIFICATION

I HEREBY CERTIFY that the foregoing Brief complies with the font type and size requirements designated in Rule of Appellate Procedure 9.210 on December 22, 2014.



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